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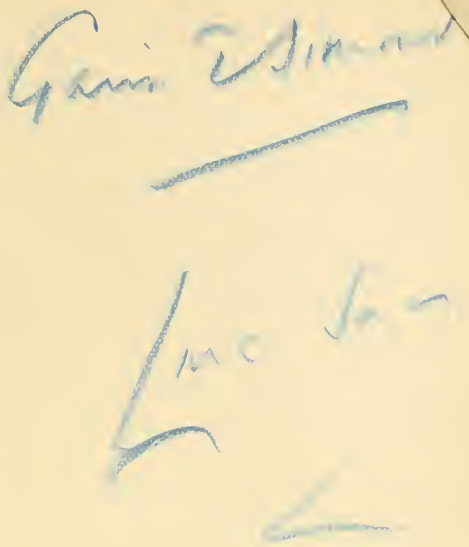

THE TIME LIMIT ON ACTIONS

THE
TIME LIMIT ON ACTIONS

BEING

A TREATISE ON THE STATUTE OF LIMITATIONS

AND

THE EQUITABLE DOCTRINE OF LACHES

BY

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PREFACE

THE present work is founded on a chapter on the Real Property Limitation Acts, 1833 and 1874, which formed part of "Possession of Land," published in 1894. I have now filled in the outline there suggested, and have included the other Statutes of Limitation, and I have attempted an analysis of the equitable doctrine of laches.

Inasmuch as the subject depends so much on statute law, I have inserted the various enactments in their appropriate places in the text, but the entire statutes are given, for the sake of reference, in the Appendix. This method, however, has had to be varied in the case of the Nullum Tempus Acts, which still cumber the Statute Book in unregenerate form, and in the text I have stated the principal provisions in shorter and more intelligible language.

The subject of dispossession is of both theoretical and practical importance, and I have endeavoured to state the effect of the authorities in a series of rules which, I hope, may be found useful. In other parts of the book recent decisions have materially assisted my task; in particular, *Perry* v. *Clissold*, [1907] A. C. 73, which has affirmed the validity of possessory titles as against strangers; *Re Nisbet and Pott's Contract*, [1906] 1 Ch. 386, which has given equitable titles an existence of their own,

independent of the legal title; and *Re Lacey*, [1907] 1 Ch. 330, which has terminated a long-existing doubt as to the effect of part payment in keeping alive the remedies for specialty debts charged on land. The whole subject of acknowledgment and part payment is left by the statutes in a state of some confusion, and, as the last-mentioned case shows, successive changes in the law have produced anomalous and undesigned results. I have attempted to arrange the statutory provisions and the cases on these heads so as to simplify the matter as far as possible; and on the subject of the book generally I hope that all the authorities of practical importance will be found to be included. Separate treatment has been given to the Public Authorities Protection Act, 1893, and in the chapter on Criminal, Crown, and Summary Proceedings I have arranged in tabular form the various limitations on Criminal Proceedings, so far as I have been able to collect them.

Custom permits the various enactments which impose time limitations on legal proceedings to be spoken of as "The Statute;" but, in fact, they cover a period of some three hundred years, and their effect depends upon a great and continually increasing accumulation of case law, and upon numerous legislative amendments. It may be suggested that the time has come when all the statutory provisions might with advantage be consolidated and harmonized so as to realize the idea of a "Statute of Limitations."

JOHN M. LIGHTWOOD.

Lincoln's Inn,
January, 1909.

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ADDENDA ET CORRIGENDA.

Page 14, line 3 *ab infra*, *for* "c. 44" *read* "c. 54."

,, 27, line 5, *for* "1802" *read* "1803."

,, 72, line 8, *for* "*Evans*" *read* "*Eames*."

,, 210, *Re Bruce*, on appeal, is now reported, [1908, 2 Ch. 682].

,, 245, line 13 *ab infra*, *for* "arises" *read* "arose." The Statutes of Set-off are repealed.

,, 246, line 6, *for* "c. 9" *read* "c. 6."

,, 249, line 21, *for* "1862" *read* "1860."

,, 252, line 5, *for* "6 H. L." *read* "5 H. L."

THE TIME LIMIT ON ACTIONS.

INTRODUCTION.

(1) *Policy of the Statutes of Limitation.*

The object of Statutes of Limitation.

The policy of fixing a period of limitation for actions has long been incorporated in the statute law, the chief of the existing statutes being the Real Property Limitation Acts, 1833 and 1874 (land, rent-charges, and charges on land), the Limitation Act, 1623 (simple contract and tort), and the Civil Procedure Act, 1833 (specialty debts). "All Statutes of Limitation," said Lord St. Leonards in *Trustees of Dundee Harbour* v. *Dougall* (1852), 1 Macq. H. L. p. 321, "have for their object the prevention of the rearing up of claims at great distances of time when evidences are lost, and in all well-regulated countries the quieting of possession is held an important point of policy": see *per* Lord Redesdale in *Cholmondeley* v. *Clinton* (1821), 4 Bligh, p. 106; *per* Wood, V.C., in *Manby* v. *Bewicke* (1857), 3 K. & J. p. 352. Lord Kenyon described the Statutes of Limitation as "statutes of repose" (see *per* Dallas, C.J., in *Tolson* v. *Kaye* (1822), 3 Br. & B. p. 223); and Bramwell, B., spoke of them collectively as "a statute of peace": *Hunter* v. *Gibbons* (1856), 26 L. J. Ex. p. 5. And this is the prevailing view, though occasionally intimations of a contrary opinion are to be found. In *Re Baker* (1890), 44 C. D. p. 270, Cotton, L.J., went so far as to say that the plea of the statute was never looked upon with any favour; and in *Stamford, etc., Banking Co.* v. *Smith*, [1892] 1 Q. B. 765, Lindley, L.J., spoke of the case before the Court as "one of the few cases in which the Statute of Limitations comes in aid of an honest defence."

Sometimes, no doubt, the statute may be used to defeat a debt clearly due, and to such cases these last observations may be referred. But as to the general utility of fixing a period to litigation—especially when the title to real estate is in question—there is probably no difference of opinion. The grounds upon

which this policy is based were well stated by Plumer, M.R., in his judgment in *Cholmondeley* v. *Clinton* (1820), 2 Jac. & W. p. 140: "The public have a great interest in having a known limit fixed by law to litigation, for the quiet of the community, and that there may be a certain fixed period, after which the possessor may know that his title and right cannot be called in question. It is better that the negligent owner, who has omitted to assert his right within the prescribed period, should lose his right, than that an opening should be given to interminable litigation, exposing parties to be harassed by stale demands, after the witnesses of the facts are dead, and the evidence of the title lost. The individual hardship will, upon the whole, be less, by withholding from one who has slept upon his right, and never yet possessed it, than to take away from the other what he has long been allowed to consider as his own, and on the faith of which the plans in life, habits, and expenses of himself and his family may have been unalterably formed and established—*rigilantibus et non dormientibus lex succurrit.*" Moreover, reliance is continually placed on the statute for the purpose of vesting the legal estate in the owner of land for the time being. In *O'Connor* v. *Foley*, [1906] 1 I. R. 20, C. A., Holmes, L.J., observed (p. 39) that in Ireland the titles of small occupiers of leasehold land were generally dependent on the statute, since they did not take out administration to their predecessors.

(2) *Construction of the Statutes.*

Construction of the statutes.

The Statutes of Limitation being thus generally approved as incorporating a principle of great benefit to the community, it has sometimes been said that they ought to receive a liberal construction: see *King* v. *Walker* (1760), 1 W. Bl. p. 287; *Tolson* v. *Kaye* (1822), 3 Br. & B. p. 223; *Lafond* v. *Ruddock* (1853), 13 C. B. p. 820; and, in consequence, that the exceptions to the statutes should not be extended further than is necessary: *Perry* v. *Jackson* (1792), 4 T. R. p. 519. But it may be doubted whether there is any such rule of construction. A Statute of Limitation, like any other statute, must be interpreted in accordance with the fair meaning of the language used, and a litigant who relies upon it must bring his case within its terms as so interpreted. "I should be very unwilling," said Lord Cranworth, C., in *Roddam* v. *Morley* (1857), 1 De G. & J. p. 23, "to

give encouragement to the notion that there is of necessity anything morally wrong in a defendant relying on a Statute of Limitation. It may often be a very righteous defence. But it must be borne in mind that it is a defence the creature of positive law, and therefore not to be extended to cases which are not strictly within the enactment." Though founded, indeed, on considerations of public policy, the statute may bear hardly in individual cases, and the Court, before holding a claim to be barred by lapse of time, must see clearly that the statute applies. The several Statutes of Limitation are *in pari materia*, and should as far as possible receive the same construction: *Murray* v. *East India Co.* (1821), 5 B. & A. p. 215.

(3) *Pleading the Statute.*

When statute must be pleaded.

Some statutes, such as the Real Property Limitation Acts, 1833 and 1874, so far as they apply to real estate, operate by extinguishing the former owner's title; others, as the Limitation Act, 1623, bar his right of action only, but leave his substantive right intact, so that he is at liberty to avail himself of it by any means which do not require him to take proceedings to enforce it. This distinction has an important result as regards procedure. When a plaintiff is seeking to assert a title which has been extinguished by the statute, the defendant is not bound to plead the statute in his defence; when, on the other hand, the plaintiff's remedy only is barred, the defendant cannot set up the statute unless he has specially pleaded it. "The necessity to plead a Statute of Limitations applies to cases where the remedy only is taken away, and in which the defence is by way of confession and avoidance; not where the right and title to the thing is extinguished and gone, and the defence is by denial of that right": *per* Patteson, J., in *De Beauvoir* v. *Owen* (1850), 5 Ex. p. 177; *Re Burge: Gillard* v. *Lawrenson* (1887), 57 L. T. 364.

Action to recover land.

Hence the defendant in an action for recovery of land need not plead the statute; it is sufficient for him to plead that he is in possession (R. S. C., 1883, Ord. 21, r. 21), and under such a plea he can take advantage of any defect in the plaintiff's title due to the operation of the statute: see *Heath* v. *Pugh* (1881), 6 Q. B. D. p. 353, C. A. It is for the plaintiff to prove a title which has not been extinguished by the statute: *Dawkins* v. *Penrhyn*

(1878), 4 App. Cas. 51; and if the statute has apparently run he must allege any special matter, such as an acknowledgment, upon which he relies to exclude it. As to the particularity with which he must allege his title, see *Philipps* v. *Philipps* (1878), 4 Q. B. D. 127, C. A.; *Darbyshire* v. *Leigh*, [1896] 1 Q. B. 554, C. A.; and as to the plea of possession, see *Danford* v. *McAnulty* (1883), 8 App. Cas. 456.

Other actions.

In cases other than claims to recover land and rent-charges, and except, perhaps, in penal actions (*infra*, p. 240), the statute must be pleaded: R. S. C., 1883, Ord. 19, r. 15; and equally so when the defendant seeks to limit the period of an account: *Roch* v. *Callen* (1848), 6 Hare, 531. It seems to be sufficient to plead "the Statute of Limitations" generally, and the defendant can then rely upon the particular statute applicable to his case: *Adams* v. *Barry* (1845), 2 Coll. 285, p. 293. But a direction to the contrary is given in the form of defence in the Appendix to the R. S. C. (App. D. sect. 4, General Defences, 11), and it is better to plead the particular statutory provision. This is unnecessary, however, in the County Court where the general plea of "a Statute of Limitations" is expressly prescribed: C. C. R., 1903, Ord. 10, r. 14, Form 85; see *Eaton* v. *Tapley*, [1899] 1 Q. B. 953. And as to pleading the statute, see Bullen and Leake, Precedents of Pleading, 6th ed. pp. 717 *et seqq.*, pp. 873 *et seqq.*

Effect of pleading the statute.

The effect of a plea of the statute is to admit the plaintiff's original right to sue, but to allege that the remedy has been lost by lapse of time: *Scarpellini* v. *Atcheson* (1847), 7 Q. B. p. 878; see *Margetts* v. *Bays* (1836), 4 A. & E. 489. And the burden of disproving this allegation is on the plaintiff. This he may do by proving that the cause of action arose within the statutory period, or that the action has been kept alive by acknowledgment, or part payment, or that the period must be extended in consequence of disability or concealed fraud: *Hurst* v. *Parker* (1817), 1 B. & A. 92; *Beale* v. *Nind* (1821), 4 B. & A. p. 571; *Wilby* v. *Henman* (1834), 2 C. & M. 658. But he should not anticipate the defence by alleging a reason for excluding the statute in the statement of claim: *Hollis* v. *Palmer* (1836), 2 Bing. N. C. p. 717. The usual place for any such matter is in the reply: see Bullen and Leake, Precedents of Pleading, 6th ed. pp. 723 *et seqq.*, *infra*, p. 325.

Plea of the general issue.

By 21 Jac. 1, c. 4, s. 4, it is provided that the general issue may be pleaded in an action on a penal statute, and that any

special matter—which includes the Statute of Limitations—may be given in evidence under such plea. The right to use this plea is preserved by the R. S. C., 1883 : see Ord. 19, r. 12 ; Ord. 21, r. 19 ; and it seems, therefore, that in such a case it is not necessary to plead the Statute of Limitations specially : 2 Wms. Saund., notes to *Hodsden* v. *Harridge*, p. 162 ; *Earl Spencer* v. *Swannell* (1838), 3 M. & W. 154. Formerly many statutes fixed a special limitation for actions brought against persons acting in pursuance of them, and allowed the limitation to be set up under a plea of the general issue : see *Bailey* v. *Warden* (1815), 4 M. & S. p. 407 ; but as regards such cases the plea is in practice abolished by the Public Authorities Protection Act, 1893 (*infra*, Chap. VIII.), and a defendant relying on the six months' limitation of that statute must plead it.

CHAPTER I.

LAND AND RENT-CHARGES.

SECTION I.—GENERAL RULE OF LIMITATION.

(1) *Adverse Possession under Old Law.*

Law before 1833.

PRIOR to the year 1833 a right to recover land might be barred either by the Statutes of Limitation (32 Hen. 8, c. 2, which barred real actions, such as the writ of right and novel disseisin, and 21 Jac. 1, c. 16, which barred ejectment), or by the operation of the Statute of Fines (4 Hen. 7, c. 24). The Statute of Fines both barred the remedy and extinguished the right; the Statutes of Limitation only barred the remedy: *Hunt* v. *Burn* (1702), 2 Salk. 422. The statute of James, to which recourse was usually had, imposed a limitation of twenty years upon the right of entry—and therefore upon ejectment, which assumed a right of entry—the period running from the time when the right first accrued. The right of entry was held to accrue so soon as there was an adverse possession—that is, a possession inconsistent with the title of the true owner—but in practice there was difficulty in deciding when possession was adverse in this sense. Moreover, the operation of the statute was restricted by technical rules which settled that in certain cases the possession, though held without title, was not to be deemed adverse. Such were the rules that the possession of the younger brother was the possession of the heir; that the possession of one of several co-owners was the possession of the rest; and that a tenant for years, who remained in possession after the term had expired, held on behalf of his lessor.

Abolition of the old doctrine of adverse possession.

Under the R. P. L. A., 1833, it was still true that time ran from the accrual of the right of entry (or right of action), and where no specific rule was given in the Act, the date of accrual had to be determined upon general principles: *infra*, p. 15. But for nearly all cases in which the statute could operate, specific rules were laid down for ascertaining the date of

accrual, and the rules which formerly prevented possession from being adverse were expressly or impliedly abolished. Sect. 12 provided that the possession of one of several co-owners was not to be deemed to be the possession of the rest; sect. 13, that the possession of a younger brother was not to be deemed to be the possession of the heir; and sects. 3 (clause 4), 7, and 8, enabled a tenant, whether for years, or from year to year, or at will, to gain a title against his landlord by holding over after the time when the tenancy had actually expired, or for the purpose of the statute, was to be deemed to have expired.

Hence, it was held, soon after the passing of the Act of 1833, that the effect of the Act was to abolish the old doctrine of adverse possession: *Nepean* v. *Doe* (1837), 2 M. & W. p. 911; *Culley* v. *Taylerson* (1840), 11 A. & E. p. 1015. In cases where a possession, which was not adverse before 1833, became adverse by virtue of the Act of that year, sect. 15 allowed a period of five years for the prosecution of claims: see *Ex parte Hasell* (1839), 3 Y. & C. Ex. 617; *Culley* v. *Taylerson* (1840), 11 A. & E. 1008; *O'Sullivan* v. *M'Swiney* (1839), 2 Ir. L. R. 89; (1841), Long. & Towns. 111. It did not apply to the limitation in favour of a mortgagee under sect. 28: *Browne* v. *Bishop of Cork* (1839), 1 Dr. & Wal. 700. The system of limitation by the operation of fines was abolished by the Fines and Recoveries Act, 1833, s. 2.

The R. P. L. A., 1833, was not retrospective: *Peyton* v. *M'Dermott* (1837), 1 Dr. & Wal. 198; *Murphy* v. *Sterne* (1838), *ibid.* 236. As to tenancies at will existing prior to the Act, see *Doe* v. *Thompson* (1837), 6 A. & E. 721; *Doe* v. *Bold* (1847), 11 Q. B. 127.

(2) *Adverse Possession under Present Law.*

Adverse possession under the R.P.L. Acts.

Although the old doctrine of adverse possession has been abolished, it is still convenient to speak of a possession in favour of which the statute is running as adverse: see *per* Lord St. Leonards in *Dean of Ely* v. *Bliss* (1852), 2 D. M. & G. p. 477. In general, possession is adverse in this sense whenever it is held without title, or is incompatible with the claimant's title: *Des Barres* v. *Shey* (1873), 29 L. T. 592, P.C.; but the old rule that possession, when possible, is to be referred to a lawful title (*Doe* v. *Brightwen* (1809), 10 East, 583) still holds good: *Thomas* v. *Thomas* (1855), 2 K. & J. p. 83; *Lewis* v. *Rees* (1856),

3 K. & J. p. 151. A possession, however, held under title may be adverse, and a possession without title may, for some purposes, be non-adverse. A tenant at will who holds for more than a year remains tenant at will, and is in possession under that title, yet the statute is running in his favour; on the other hand, where land is subject to a mortgage, the statute does not run against the mortgagee in favour of a stranger in possession of the land so long as the mortgagor pays interest to the mortgagee, or, more strictly, such payment of interest continually checks the operation of the statute: *Doe* v. *Eyre* (1851), 17 Q. B. 366; *Doe* v. *Massey* (1851), 17 Q. B. 373; *Ford* v. *Ager* (1863), 2 H. & C. 279; provided the adverse possession began after the creation of the mortgage: *Thornton* v. *France*, [1897] 2 Q. B. 143, C. A.

(3) *Rule of Limitation.*

An action for the recovery of land or of a rent-charge must be brought within twelve years after the right of action has accrued to the plaintiff or to his predecessor in title:—

R. P. L. A., 1874, s. 1. No land or rent to be recovered but within twelve years after the right of action accrued.

> "After the commencement of this Act no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same."

This replaced sect. 2 of the Act of 1833, the time of limitation being shortened from twenty to twelve years. Previously to that Act there was no statutory limitation on rent-charges: *Stackhouse* v. *Barnston* (1805), 10 Ves. 453.

"Person."

The word "person" extends to a body politic, corporate, or collegiate, and to a class of creditors or other persons, as well as to an individual: R. P. L. A., 1833, s. 1; see "Charities," *infra*, p. 75.

Action to recover land.

The phrase "action to recover land" includes not only actions which are aimed directly at the recovery of possession of land, such as the action to recover land which in the High Court has taken the place of ejectment, and the County Court

actions for the recovery of land and the recovery of possession (County Court Acts, 1888, ss. 49, 138); but also all actions, such as an action to compel the lord of a manor to admit the heir of a deceased copyhold tenant (*Walters* v. *Webb* (1870), 5 Ch. 531), or for a declaration of a right to dower (*Marshall* v. *Smith* (1867), 5 Giff. 37), which are intended to have this result. And it is the same whether the remedy is at law or in equity, the former discretion of Courts of Equity having been put an end to by sect. 24 of the Act of 1833: *infra*, p. 68; *Berrington* v. *Evans* (1835), 1 Y. & C. Ex. 434. Moreover, the Act of 1874 expressly extends to suits, and shortly after it was passed the distinction between actions and suits was abolished: Judicature Act, 1875, s. 16; R. S. C., 1883, Ord. 1, r. 1.

Foreclosure action.

At one time it was thought that a foreclosure action was in substance an action for the recovery of money: *Dearman* v. *Wyche* (1839), 9 Sim. 570; *Du Vigier* v. *Lee* (1843), 2 Hare, 326. But the object of the mortgagee in bringing the action is to exclude the mortgagor's equity of redemption, and at the same time to convert himself from a mere incumbrancer—for in equity this is the position of even a legal mortgagee—into the owner of the land; and it is now settled that the action ranks as an action to recover land: *Wrixon* v. *Vize* (1842), 3 Dr. & War. 104; *Heath* v. *Pugh* (1881), 6 Q. B. D. p. 364, C. A.; *Harlock* v. *Ashberry* (1882), 19 C. D. 539, C. A.

(4) *Statute runs against Successors in Title.*

Devolution of title.

From the language of sect. 1 of the R. P. L. A., 1874, it follows that when the statute has commenced to run against a person entitled, it continues to run both as against him and as against persons deriving title under him; or, more exactly, against persons claiming through him within the meaning of the following definition:—

R. P. L. A., 1833, s. 1. "Person through whom another claims."

> "The person through whom another person is said to claim shall mean any person by, through, or under, or by the act of whom the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat."

Statute runs against successors in title.

Thus, where an owner has been dispossessed, or the statute is otherwise running against him, it runs also against persons entitled under him in any of these capacities. In common, however, with the other definitions in sect. 1, this definition does not apply where the meaning assigned by it is excluded by the nature of the particular provision or by the context of the Act. Hence the term "appointee" in the definition must be limited to persons taking by appointment under a general power. In effect they take, like an heir or devisee, the estate of the appointor. It does not extend to an appointee under a special power contained in a settlement, as where a tenant for life has power to appoint to a limited class. The limitation to the appointee is then read into the settlement, and the estate of the appointee takes effect, for the purposes of the statute, as a remainder upon the estate of the tenant for life: *Re Earl of Devon's S. E.*, [1896] 2 Ch. 562.

"Appointee."

(5) *Operation of Statute.*

Mode of operation of statute.

The statute assumes that an owner, or other person interested in land, is out of possession and is entitled to recover possession by legal process: *Hindson* v. *Ashby*, [1896] 2 Ch. 1, C. A. The date when his right to take proceedings first accrues gives the starting-point for the statute, and if this right is not exercised in twelve years, it is barred. Under sect. 34 of the Act of 1833 the title also is extinguished, and the result is to create a new title in the adverse possessor. But there must be an adverse possessor in order to bring the statute into operation. It does not run unless there is a person in whose favour it can run: *Smith* v. *Lloyd* (1854), 9 Ex. 562; though its operation does not depend on the *bona fides* of the possessor, *Vane* v. *Vane* (1873), 8 Ch. 397; *cf. Tuthill* v. *Rogers* (1844), 1 Jo. & Lat. p. 64. Its effect may be to confirm a meritorious but defective title; on the other hand, it may enable a mere trespasser to appropriate the land of another. He must, however, be in possession on his own account. The statute does not run in favour of an agent or servant, and where persons are in occupation in such a character, the possession is deemed to remain in the principal or employer (*infra*, p. 30).

Where owner cannot alienate.

The statute runs, notwithstanding that the dispossessed owner has no power to alienate the land: *Mayor of Brighton* v. *Guardians of Brighton* (1881), 5 C. P. D. 368; and consequently a title can be

gained by adverse possession of land of a railway company, even though it is not superfluous land: *Bobbett* v. *South-Eastern Ry. Co.* (1882), 9 Q. B. D. 424; *Midland Ry. Co.* v. *Wright*, [1901], 1 Ch. 738. But the particular provisions of a private Act may prevent the non-possession of a tenant in tail from prejudicing those in remainder: *Earl of Abergavenny* v. *Brace* (1872), L. R. 7 Ex. 145.

(6) *Cessation of Statute.*

Re-entry.

The statute ceases to run if the adverse possession in favour of which it is running comes to an end, either in consequence of a re-entry by the true owner, or an abandonment of possession by the adverse possessor. Under the old law a merely formal entry by the person entitled was sufficient to vest the possession in him, or, if he dared not enter for fear of injury, the same result was attained by his going as near the land as he dared, and making his claim: Co. Litt. 253 b; though under 4 & 5 Anne, c. 16, s. 16, such an entry or claim was not effectual to avoid the statute 21 Jac. 1, c. 16, unless an action was commenced within a year and prosecuted with effect.

Abolition of entry and continual claim.

In pursuance of the suggestion of the Real Property Commission of 1833 (First Report, p. 41), the doctrine of mere entry and continual claim was abolished:—

R. P. L. A., 1833, s. 10.

"No person shall be deemed to have been in possession of any land within the meaning of this Act merely by reason of having made an entry thereon.

S. 11.

"No continual or other claim upon or near any land shall preserve any right of making an entry or distress or of bringing an action.

Entry must be effective.

The result is that an entry, to vest the possession in the person entering and prevent the bar of the statute, must be effective as opposed to merely formal. "The making an entry amounts to nothing unless something is done to divest the possession out of the tenant, and re-vest it in fact in the lord": *Doe* v. *Coombes* (1850), 9 C. B. p. 718. And it must be made *animo possidendi*: *Solling* v. *Broughton*, [1893] A. C. 556.

The entry is most effectually made if the occupier is actually put out of possession: see *Randall* v. *Stevens* (1853), 2 E. & B. 641, stated *infra*, p. 100. If, however, the occupier or his family remain on the land, the owner must exercise substantial acts of ownership, and merely formal acts intended to assert his

right are not sufficient. In *Doe* v. *Coombes* (*supra*), Coombes had encroached on the waste of a manor, and had built himself a hut. In 1835, the encroachment having been presented at the lord's court, the lord of the manor, accompanied by the steward, went to the premises, and, finding Coombes' wife and family there, they entered. The lord stated that he took possession, and directed that a stone should be taken out of the wall of the hut, and that a portion of the fence should be removed. This was done without any objection being made, and the lord and the steward then retired. This was no more than a mere entry, and was not sufficient to vest the possession in the lord: *cf. Thorp* v. *Facey* (1866), 35 L. J. C. P. 349; *R.* v. *Inhabitants of Wooburn* (1830), 10 B. & C. 846.

But slighter acts will be sufficient if no person is actually on the land at the time of re-entry, although the possession may not be vacant. In *Worssam* v. *Vandenbrande* (1868), 17 W. R. 53, the defendant, more than twenty years before the action, had entered into possession of land, and had enclosed it with a fence. Between nineteen and twenty years before the action the predecessors in title of the plaintiffs went to the land, broke down the fence, and erected a post with the announcement that applications for a lease of the land were to be made to them. They remained on the land three-quarters of an hour. Three days later the post was gone, but there was no evidence to show who had removed it. For the next five years no one, so far as appeared, did anything on the land, and then the defendant re-entered and built upon it. It was held that the plaintiffs' predecessors had effectively resumed possession.

Abandonment of possession.

The statute ceases to run, also, if the adverse possessor quits the land and leaves the possession vacant. There is no person now in whose favour it can run, and the true owner is in the same position in all respects as before the intrusion took place: *Trustees' Agency Co.* v. *Short* (1888), 13 App. Cas. 793; *cf. Willis* v. *Earl Howe*, [1893] 2 Ch. 545, C. A.

(7) *Church Lands.*

Spiritual and eleemosynary corporations sole.

In the case of land or rent belonging to a spiritual or eleemosynary corporation sole, a special period of limitation is assigned:—

R. P. L. A., 1833, s. 29.

"It shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or

eleemosynary corporation sole, to make an entry or distress or to bring an action or suit to recover any land or rent within such period as hereinafter is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress or bring such action or suit shall first have accrued; (that is to say), the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will, with the time of holding of such two persons and such six years, make up the full period of sixty years; and no such entry, distress, action, or suit shall be made or brought at any time beyond the determination of such period."

Two incumbencies and six years of a third, with a maximum of sixty years.

Thus land or rent can be recovered by such a corporation within a period measured by two incumbencies of the office or benefice in respect of which it is claimed, and six years of a third incumbency; but if these times do not give an aggregate of sixty years, so many years are to be added as will make up the deficiency. The period is reckoned from the date of accrual of the right of action, and this date has to be ascertained in accordance with the other relevant provisions of the Acts: *Archb. of Dublin* v. *Trimleston* (1849), 12 Ir. Eq. R. 251.

If a statute transferring the lands of a spiritual corporation sole to the Ecclesiastical Commissioners contains a clause, such as sect. 57 of 3 & 4 Vict. c. 113, preserving, in favour of the commissioners, the rights and remedies of the corporation for obtaining possession of lands, and if the statute is already running against the corporation at the date of transfer, the commissioners can recover possession within the same period as would have been allowed to the corporation under sect. 29 had there been no transfer: *Ecclesiastical Commissioners* v. *Rowe* (1880), 5 App. Cas. 736. But in the absence of such special provision, the Ecclesiastical Commissioners, and any other lay corporations to whom the property of spiritual corporations sole is by statute transferred, are within sect. 1 of the R. P. L. A., 1874, and are allowed only twelve years from the time when the right of entry accrued to the spiritual corporation. The definition of

Transfer of Church lands to lay corporation.

"person" extends to all corporations without any exception of those which are spiritual or sole (*supra*, p. 8), and the right of entry accrued to a "person" through whom the lay corporation claims. Consequently, if the transfer takes place when more than twelve years, but less than the time prescribed by sect. 29, have run against the spiritual corporation, the lay corporation takes a title which by the transfer becomes extinct: *Irish Land Commission* v. *Grant* (1884), 10 App. Cas. 14; *Ecclesiastical Commissioners* v. *Rowe* (*loc. cit.* at p. 749). And even if there is such a special provision, it ceases to operate so soon as the lay corporation are in possession, and, if they are subsequently dispossessed, they are allowed only the usual period of limitation: *Ecc. Comm.* v. *Rowe* (p. 745).

(8) *Advowsons.*

Limitation in respect of advowsons.

The statute begins to run against the owner of an advowson so soon as an adverse presentation is made, and his action to enforce the right of presentation is barred after three consecutive adverse incumbencies, if the time of such incumbencies amounts to sixty years; if it is less, he has such further period as will make up the sixty years: R. P. L. A., 1833, s. 30. If, after an adverse incumbency, the Crown or bishop presents by reason of a lapse, this is reckoned as another adverse incumbency; but a clerk presented by the Crown upon the promotion of the incumbent to a bishopric is deemed to continue the incumbency of the promoted clerk: sect. 31. An owner who claims an advowson by virtue of an estate which the owner of an estate tail in the advowson might have barred is deemed to be a person claiming through the tenant in tail: sect. 32. Hence, if the statute has begun to run against the tenant in tail in possession, it runs also against the issue in tail and remaindermen. Sect. 33 provides a maximum limit of one hundred years from the first adverse presentation, unless the running of the statute is stopped by a presentation made by the owner. These provisions as to advowsons did not at first apply to Ireland: R. P. L. A., 1833, s. 44; but they were extended to that country by 6 & 7 Vict. c. 54. Both the words excluding Ireland in sect. 44, and the extending provisions of 6 & 7 Vict. c. 44, have been repealed: Statute Law Revision Acts, 1874 (37 & 38 Vict. c. 35); 1891 (54 & 55 Vict. c. 67). The Act 6 & 7 Vict. c. 54, also

provided, by sect. 3, that the statute should run against a bishop's right to collate to or bestow any benefice in his diocese, and that his right should be extinguished in the same manner and at the same periods as the right of any other patron.

(9) *Accrual of Right of Action.*

Date of accrual of right of action.

In order to apply the rule of limitation, it is necessary to fix the date when the right of action "first accrued" (see *Irish Land Commission* v. *Junkin* (1888), 24 L. R. Ir. p. 44) to the claimant or his predecessor in title. This depends upon the nature of the interest in question. The ownership of land is divided in various ways: into simultaneous interests; either of the same nature, as in the case of co-owners; or of different natures, as in trusts, mortgages, and copyholds; and into successive interests, as life estates and remainders. As regards many of these interests, directions are specifically given by the statutes as to the time when the right of action is to be deemed to have accrued. To such an extent is this done, that it was formerly a matter of doubt whether the Legislature did not intend thus to provide for all cases intended to fall within the statutes, and on this assumption any case not expressly provided for would not be subject to any period of limitation. It is settled, however, that the provisions which fix the date when the right of action shall be deemed to have accrued are not exhaustive, and, where they afford no guidance, recourse must be had to general principles: *James* v. *Salter* (1837), 3 Bing. N. C. p. 553; *Magdalen Hospital* v. *Knotts* (1878), 8 C. D. p. 727, C. A.; *Pugh* v. *Heath* (1882), 7 App. Cas. p. 238; *Irish Land Commission* v. *Junkin* (1888), 24 L. R. Ir. 40; *Re Earl of Devon's Settled Estate*, [1896] 2 Ch. 562. Time in such cases runs from the actual date of accrual of the right of action, and this corresponds with the date when the claimant's right to possession has been infringed.

Landlord and tenant.

The division of rights between landlord and tenant requires special notice. The landlord parts with his right to possession, and, so far as this is concerned, he is in the same position as the remainderman after a particular freehold estate: *cf.* Co. Litt. 143 a. Both the landlord and the remainderman must wait for the determination of the prior interest before their right to possession of the land arises, and in respect of such right each has merely a future interest. Consequently, in the

absence of special provision, a landlord's rights are governed by the general provisions of the R. P. L. Acts relating to future interests.

But for practical purposes the cases are widely different, the landlord being in fact in the present enjoyment of the advantages of ownership. Sometimes, indeed, the landlord is spoken of as though he was in possession of the land by means of his tenant: *Lyell* v. *Kennedy* (1889), 14 App. Cas. 437; but the landlord's possession in such a case is technically described as seisin. The possession of the tenant supports the seisin of the landlord: *Bushby* v. *Dixon* (1824), 3 B. & C. p. 304; and so in *Doe* v. *Finch* (1832), 4 B. & Ad. at p. 300, Denman, C.J., observed, "Where it is said that the possession of tenant for years is the possession of the party entitled to the freehold, that imports that such person is seised of the estate of freehold." While, however, this is true with regard to possession of the land, the receipt of rent marks the landlord as being in present possession of his rights as owner: *cf.* the Conveyancing Act (1881), s. 2 (iii), and the Settled Land Act (1882), s. 2 (10) (1), where "possession" is defined as including the receipt of income.

Consequently, although in the operation of the R. P. L. Acts it is only actual possession which in general is contemplated, the theory has to be modified in dealing with the rights of landlords, and under certain circumstances a lessor is regarded as having a present interest which is liable to be barred. At the same time the lessee has a right of property which is capable of modification, and it may, and, in cases where the lease is not at a rack rent, frequently is, dealt with on the same footing as the ownership. It is divided into successive or concurrent interests, and is made the subject of trusts and mortgages.

In considering the application of the rule of limitation, the matters to be noticed are (1) the subject-matter of the rule; (2) its operation in particular cases; and (3) the nature of the possessory title which is acquired under the statute.

Section II.—The Subject-matter of Sect. 1 of the R. P. L. A., 1874.

(1) *Land.*

The R. P. L. A., 1833, defines "land" as follows:—

R. P. L. A., 1833, s. 1. "Land."

> "The word 'land' shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure."

Interests in land.

The definition thus includes land, regarded as a physical thing, and also the estates and interests which may exist in it. Ordinarily an estate or interest in land (as to these terms, see Co. Litt. 345 a, b) involves, at some time or other, a right to possess the land; though the term "interest" is not thus restricted, and it applies to a charge on land: *Driver* v. *Broad*, [1893] 1 Q. B. 744, C. A.; and to a right to the proceeds of sale of land: *Bowyer* v. *Woodman* (1867), 3 Eq. 313. But for the purpose of sect. 1 of the Act of 1874, it is in general sufficient to regard "land" as meaning the physical thing. The right of entry is exercised, or the action brought, to recover possession of the land itself. "The Act," said Lord St. Leonards in *Dean of Ely* v. *Bliss* (1852), 2 D. M. & G. p. 473, "does not deal with land in any other sense than in that where a person has the right to the land itself." The Acts do not apply to land in Jamaica: *Pitt* v. *Lord Dacre* (1876), 3 C. D. 295.

Land as a physical object.

"Land," says Lord Coke, "in the legal signification, comprehendeth any ground, soil, or earth whatsoever; as meadows, pastures, woods, moors, waters, marishes, furses, and heath" (Co. Litt. 4 a). All these things are the subject of estates of inheritance, and are corporeal hereditaments. And the ownership and possession of the surface of the earth generally carry with them the ownership and possession of all that is below and all that is above the surface. But this is not necessarily the case, and just as the area of land is divided by surface boundaries,

so the column reaching from below the surface into the air above may be divided into layers, and the R. P. L. Acts apply to any layer or other portion of which separate possession can be shown. Thus by means of a projection from a building adverse possession may be gained of a definite space above the soil: see *Layburn* v. *Gridley*, [1892] 2 Ch. 53; though the possession is limited to such space, and does not carry with it the possession of the space above. This remains with the surface owner. Similarly a title to a tunnel may be obtained by exclusive possession: *Bevan* v. *London Portland Cement Co., Ltd.* (1892), 67 L. T. 615; or to surface land over a tunnel: *Midland Ry. Co.* v. *Wright*, [1901] 1 Ch. 738.

Mines.

Severance of surface and minerals.

The question of the division of land in this manner is chiefly of importance with regard to mines; and as to these, the recognition of separate possession follows the ordinary law of property. "It is of universal experience," said Ellenborough, C.J., in *Barnes* v. *Mawson* (1813), 1 M. & S. at p. 84, "that one person may have in him the freehold title to land, whilst another has the exclusive right to mines under it." Hence there is no universal presumption that the fee simple of the land carries with it the right to minerals: *Rowe* v. *Grenfell* (1824), Ry. & Moo. 396; and the severance that may exist between the title to and the possession of the surface and the title to and possession of the mines is well established: see *Earl of Cardigan* v. *Armitage* (1823), 2 B. & C. 197; *M'Donnell* v. *M'Kinty* (1847), 10 Ir. L. R. 514; *Eardley* v. *Granville* (1876), 3 C. D. 826; *Batten Pooll* v. *Kennedy*, [1907] 1 Ch. 256; *Rich* v. *Johnson* (1741), 2 Str. 1142.

Possession of mines.

It being thus possible in law to sever the mines from the surface, they may be treated as the subject of separate possession and are within the R. P. L. Acts. Consequently a seam of coals cannot be prescribed for, though it is otherwise with a mere right to take coals in the land of another: *Wilkinson* v. *Proud* (1843), 11 M. & W. 33. Legally the term "mine" includes surface workings as well as mines underground: *Midland Ry. Co.* v. *Robinson* (1889), 15 App. Cas. 19; *cf. Lord Provost of Glasgow* v. *Fairie* (1888), 13 App. Cas. 657. To gain a title by possession, it is sufficient to be able to establish possession throughout the requisite period of a definite part of the crust of

the earth, and this may be an open quarry: *M'Donnell* v. *M'Kinty* (1847), 10 Ir. L. R. at p. 525; a bed of clay: *Carlyon* v. *Lovering* (1857), 1 H. & N. at p. 799; or mines in the ordinary sense: *Rowbotham* v. *Wilson* (1857), 8 E. & B. at p. 142; *Ashton* v. *Stock* (1877), 6 C. D. 719. But the mere getting by a mine-owner of minerals from neighbouring mines will not give him possession of those mines: *Ashton* v. *Stock*; *Thompson* v. *Hickman*, [1907] 1 Ch. 550.

Tithes.

Claimants to tithe.

By the definition clause (*supra*, p. 17) the term "land" is expressly extended to include "tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole)"; but the statute only applies as between rival claimants to the tithe, and not as between tithe-owner and tithe-payer: *Dean of Ely* v. *Bliss* (1852), 2 D. M. & G. 459; *Lord Shannon* v. *Hodder* (1837), 2 Ir. L. R. 223; *Lord Shannon* v. *Stoughton* (1841), 3 Ir. L. R. 521; see *Irish Land Commission* v. *Grant* (1884), 10 App. Cas. 14; though it is otherwise as to tithe rent-charge: *infra*, p. 27. In *Dean of Ely* v. *Bliss* (*loc. cit.*, pp. 469, 470), Lord St. Leonards based this construction partly on the ground that a limitation as between tithe-owner and tithe-payer had just been introduced by the Tithe Prescription Act, 1832 (2 & 3 Will. 4, c. 100), an Act which, at the time of the passing of the R. P. L. A., 1833, had not yet come into operation, and which the latter Act could hardly have been intended to repeal.

Former methods of barring tithes.

Previously to 1833 a claim to the payment of tithes—that is, to payment in kind—might be resisted by setting up a *modus decimandi*, a composition real or conventional, or an exemption, but not by mere proof of non-payment. A *modus decimandi* existed where, by custom or prescription, a particular manner of tithing was allowed (as by payment of a fixed sum of money), different from the general law of taking tithes in kind: 2 Black. 29; 13 Rep. 12; Eagle on Tithes, II. 58. It was proved by evidence of the custom, or of the existence of the *modus* from time immemorial; but proof of its origin was not required. A composition real was an agreement in writing, after the beginning of the reign of Richard I., and before the disabling statute, 13 Eliz. c. 10, between the parson and the parishioners whereby lands, or the yearly profits of lands, or a rent-charge issuing out

of lands, or an annual sum of money or other recompense, was given to the parson in perpetual satisfaction and discharge of the tithes within a parish, township, or other definite quantity of land: Eagle, II. 37. A conventional composition was a temporary agreement between the parson and a parishioner for a payment in lieu of tithes (Eagle, II. 20), and calls for no further notice. Exemption from tithes depended upon the circumstance that, prior to the dissolution of the monasteries by Henry VIII., many of them held their lands discharged from payment of tithes, and in the case of the greater monasteries this exemption was expressly continued by 31 Hen. 8, c. 13, in favour of the Crown, and of all persons to whom the lands might come. Possibly there might be exemption also in the case of the lands of the smaller monasteries: Eagle, II. 274.

To establish a composition real or an exemption, evidence had to be given, in the one case, of the deed by which the composition was instituted; in the other, of the existence of the exemption at the time when the land was held by the monastery. But in either case, although time by itself could not make out a title for the defendant, yet if he could give some slight evidence from which the deed or the original exemption could be presumed, he might support his claim by proof of the length of time during which he had paid the composition or enjoyed the exemption: *Salkeld* v. *Johnston*, 1 Mac. & G. p. 261*n*. Otherwise, however, the mere lapse of time had no effect, and non-payment was not an answer to a claim for tithes, even as against a lay-impropriator: *Andrews* v. *Drever* (1835), 3 Cl. & F. 314.

Tithe Prescription Act, 1832.

To avoid the difficulties of proof which thus arose in cases of claims to tithes, it was provided by the Tithe Prescription Act, 1832 (2 & 3 Will. 4, c. 100), that claims (not made against a corporation sole) of a *modus decimandi*, or to exemption from or discharge of tithes, by composition real or otherwise, should be sustainable upon evidence showing, in cases of claim of a *modus decimandi*, the payment or render of the *modus*, and in cases of claim to exemption or discharge, the enjoyment of the land, without payment or render of tithes, money, or other matter in lieu thereof, for thirty years; unless, in the case of a claim of a *modus decimandi*, the actual payment or render of tithes in kind, or of money or other thing differing from the *modus* claimed, or in case of claim to

exemption or discharge, the render or payment of tithes, or of money or other matter in lieu thereof, should be shown to have taken place at some period prior to such thirty years, or it should be proved that such payment or render of *modus* was made, or enjoyment had, under a consent or agreement by deed or in writing; but sixty years rendered the claim indefeasible except in the case of such consent in writing. Where the claim was against a corporation sole, the period for rendering it indefeasible (save in case of consent) was two incumbencies and three years of a third; unless the two incumbencies were less in length than sixty years, in which case the payment of the *modus* or enjoyment of the land free from tithe had to be shown for sixty years and three years of a third incumbency. It thus became unnecessary to show that a composition or a claim to exemption had a legal origin: *Salkeld* v. *Johnston* (1848), 1 Mac. & G. 242; and where there was nothing but non-payment of tithes for the prescribed period, this was sufficient to show that the land was tithe-free. The Act of 1832, by sect. 3, saved suits then commenced, or which should be commenced during the current session, or within one year after: as to this, see 4 & 5 Will. 4, c. 83.

Payments analogous to tithes.

But the Tithe Prescription Act, 1832, only bars claims to tithes proper—that is, to render of tithes in kind. It is no bar to the payment of rates analogous to tithes imposed in the City of London by 37 Hen. 8, c. 12: *Payne* v. *Esdaile* (1888), 13 App. Cas. 613; or to tithe rent-charge (for which tithes have in general been commuted), or to the payment of a *modus* or composition, where a payment of this nature has been shown to exist. Such payments, however, may be subject to sect. 1 of the R. P. L. A., 1874, as "rents" (*infra*, p. 26).

(2) *Rent-charges.*

The R. P. L. A., 1833, defines "rent" as follows:—

> "The word 'rent' shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except *moduses* or compositions belonging to a spiritual or eleemosynary corporation sole)."

R. P. L. A., 1833, s. 1. "Rent."

Rent-service and rent-charge.

Rent is either rent-service or rent-charge (Litt. s. 213), and either kind of rent might formerly be rent-sec—*i.e.* rent without

a power of distress—but rent-sec is now abolished: Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28), s. 5; Conveyancing Act, 1881, s. 44. Rent-service is incident to the relation of landlord and tenant, and is in general reserved upon a lease for years; but it might, before *Quia Emptores*, have been created on a grant in fee, and it may still be created on a grant in tail or for life or lives, or reserved on a copyhold grant. It is not confined to money rents: Co. Litt. 142 a; *Doe* v. *Benham* (1845), 7 Q. B. 976; *Doe* v. *Billett*, *ibid.* p. 983; but the rent must be certain or capable of being made so: Co. Litt. 96 a. A rent-charge is created or reserved out of land by deed, will, or statute.

Exclusion of rents reserved on leases for years.

The definition clause is wide enough to include both rent-charges and all kinds of rent-service, and the question arose soon after the passing of the R. P. L. A., 1833, whether sect. 2 of that Act (now sect. 1 of the Act of 1874) applied to conventional rents reserved upon leases for years. The meaning given in the definition clause may be excluded "where the nature of the provision or the context of the Act" so requires, and it was decided in *Grant* v. *Ellis* (1841), 9 M. & W. 113; *cf.* *Paget* v. *Foley* (1836), 2 Bing. N. C. p. 688, that conventional rents are not included for reasons which may be summarized as follows: (i) The statute applies only to rents which can be "recovered" against an adverse claimant; that is, to rents for which an assize might formerly have been brought; and only freehold rent-services could have been recovered in this way: see Gilbert on Rents, p. 93; Litt. ss. 233, 236, 237–240; (ii) under sect. 3 of the Act of 1833 a claimant to "rent" must have been in receipt of it in respect of an estate or interest claimed; but a lessor has no estate in the rent: *Prescott* v. *Boucher* (1832), 3 B. & Ad. 849; and (iii) if rent reserved on a lease for years were barred, the lessor would have no means of asserting his right to receipt against a stranger who was gaining a title under sect. 9.

Grant v. *Ellis.*

These reasons are to some extent technical, and the first is open to the objection that it is based on the nature of real actions, a form of procedure which it was one of the objects of the Act of 1833 to abolish; but the decision in *Grant* v. *Ellis* has been accepted as correct: see *Donegan* v. *Neill* (1885), 16 L. R. Ir. 309; and it is settled that the bar of sect. 1 of the Act of 1874 does not apply to rents reserved on leases for years: *Dean of Ely* v. *Bliss* (1852), 2 D. M. & G., p. 477; *Archbold* v. *Scully* (1861), 9 H. L. C. p. 375; *Irish Land Commission* v.

Grant (1884), 10 App. Cas. p. 26; including penal rents: *Daly* v. *Bloomfield* (1842), 5 Ir. L. R. 65. But it does apply to rent-charges, whether ancient or created recently: *Jones* v. *Withers* (1896), 74 L. T. 572, C. A. It makes no difference that the land is in the hands of a statutory corporation (S. C.).

The distinction thus established is upon principle clear, and it is justified by the general framework of the Acts. Rent, in the sense of rent-charge, is a species of property forming an incumbrance on the ownership of land. It is a right to demand *from* the owner a share of the annual profits of the land. A conventional rent reserved on a lease, on the other hand, is paid *to* the owner as a return for the occupation and use of the land. In the one case the rent is an incumbrance on the ownership, in the other it is an incident of the ownership. Statutes which are intended to quiet the title to the ownership may therefore properly provide a bar against a forgotten rent-charge, but there is no occasion for extending this bar in favour of a lessee who, during the currency of his lease, cannot possess as owner.

Different meanings of "rent."

The different senses in which, in accordance with this distinction, the word "rent" is used in the R. P. L. A., 1833, were pointed out by Lord Denman, C.J., in *Doe* v. *Angell* (1846), 9 Q. B. p. 355: "The word is used in the sense of rent-charge in the 2nd section, and so, too, in sects. 3, 4, 5, and 7, the last of these sections contemplating the possible case of a tenancy at will in a rent-charge. In sect. 8 it is used in both senses, but the confusion is most marked in sect. 9. The word 'rent' is there used seven times. The first time it means rent-charge; the second and third, rent reserved; the fourth, rent-charge; the fifth, rent reserved; the sixth, rent-charge; the seventh, rent reserved."

Freehold and copyhold rents.

But while conventional rents on leases for years have been thus definitely excluded from the operation of the R. P. L. Acts (except as to arrears, *infra*, p. 175), there has been no tendency to carry the exclusion further, and it has been held that the bar applies to quit-rents (*De Beauvoir* v. *Owen* (1850), 5 Ex. 166), and to copyhold rents: *Howitt* v. *Earl of Harrington*, [1893] 2 Ch. 497. It would probably be held to apply also to rents reserved on leases for lives, though this point has not been decided.

Person liable to pay rent-charge.

The statute runs not only as between rival claimants to the rent-charge, but also in favour of the person liable to pay:

James v. *Salter* (1837), 3 Bing. N. C. 544; *Irish Land Commission* v. *Grant* (1884), 10 App. Cas. 14; *Payne* v. *Esdaile* (1888), 13 App. Cas. 613. Hence a quit-rent or copyhold rent can be extinguished by non-payment: *De Beauvoir* v. *Owen*, *Howitt* v. *Earl of Harrington* (*supra*); and so, too, can a modern rent-charge created by deed: *Jones* v. *Withers* (1896), 74 L. T. 572. And although there was formerly some doubt on this point with respect to tithe rent-charge, on account of its analogy with tithes (*supra*, p. 19), it is now settled that the statute applies in favour of the person liable to pay tithe rent-charge as against the person entitled: *Irish Land Commission* v. *Grant* (*supra*), overruling *Netterville* v. *Power* (1861), 13 Ir. Jur. 123.

Heriots.

Heriots excluded.

Although heriots are by the definition clause expressly included under rent, it seems to be settled by *Owen* v. *De Beauvoir* (1847), 16 M. & W. 547; *Earl of Chichester* v. *Hall* (1851), 17 L. T. O. S. 121; and *Lord Zouche* v. *Dalbiac* (1875), L. R. 10 Ex. 172, that they are not within the operation of sect. 1 of the Act of 1874. This is mainly upon the ground that the right to a heriot only arises at irregular intervals, and since the statute, on a literal construction, would run from the last time when a heriot was taken, the right might be barred before there had been any chance of asserting it. (For the various kinds of heriots, and whether recoverable by distress or seizure, see Elton on Copyholds, 2nd ed. pp. 198–203.)

Owen v. *De Beauvoir.*

In *Owen* v. *De Beauvoir* (*supra*), the point at issue was whether time ran against a freehold quit-rent from the date of the last payment or the date when the last rent unpaid fell due. On the words of sect. 3 of the Act of 1833, it was clear that the former date must be taken, but it was objected that, on this construction, a heriot, if it did not become payable for over twenty years, would be barred by lapse of time without any default in payment, and without any opportunity for the lord to enforce payment. To this argument Parke, B., replied (16 M. & W. p. 566): "As to heriots, probably the answer to this objection may be that, in a case similar to that now before us, the word 'rent' would not include heriots. For although by the interpretation clause the word 'rent' is made to include heriots, yet that is only where the nature of the provision or the

context does not exclude such a construction; and it may be that the injustice pointed out would afford grounds for holding that in the clause now under consideration (sect. 3) the word 'rent' does not include heriots."

Chichester v. Hall.

In *Chichester* v. *Hall* (1851), 17 L. T. O. S. 121, freehold land was held of a manor by services which included heriots and quit-rent. In 1804 the lord, who was entitled for life only, took a heriot on the death of the tenant, but omitted to do so on the next death, in 1824. In 1826 the lord died, and his son became tenant in tail in possession. The son claimed to seise a heriot on the next death, in 1847, and he also claimed quit-rent, of which there had been no payment since 1804. As to the quit-rent, the statute commenced to run against the son in 1826, when his estate fell into possession, and it was therefore barred in 1846. The same result would follow as to the heriot, if it was really "rent"; but since the son had taken the first heriot he could, the injustice of this was obvious. "The 2nd and 3rd sections," said Patteson, J., "cannot be put together so as to make the last receipt of a heriot, which only falls due at long and irregular intervals, the point of time from which the period begins to run. The twenty years must, I suppose, run from the time when the right to have the heriot accrued." But this supposition is hardly warranted. If, under sect. 2, rent really, as directed by sect. 1, includes heriots, and if, under sect. 3, the right to rent accrues at the date of the last payment, at the same date, too, must the right to heriots accrue. Either, then, time runs against heriots from the time when they were last taken, or, as suggested in *Owen* v. *De Beauvoir*, they are not included in sect. 2 of the statute at all.

Lord Zouche v. Dalbiac.

In *Lord Zouche* v. *Dalbiac* (1875), L. R. 10 Ex. 172, where the right to seise a heriot was alleged to be barred by statute, the new objection was taken that, among the remedies barred by sect. 2 of the Act of 1833, a right to seise was not mentioned: see *per* Kelly, C.B., *loc. cit.* p. 176; *per* Bramwell, B., p. 181. But this reason would only apply to heriots which lie in *prendre*, and the decision went upon the broader ground that a heriot differs materially from rent, and cannot, even by the express words of the definition clause, be brought within the statute. "'Rent,'" said Kelly, C.B., "is a noun of multitude, meaning not one single sum due at some one moment, which may be recovered by action, and may be lost if not, but meaning

a succession of sums of money payable, in general, yearly or at shorter intervals during the whole term specified. A heriot is a right to take a specific chattel, a right arising either upon death or alienation in a manor. It is not of a continuous nature. To apply to such a subject words in the statute which are applicable only to continuous payments would be to disregard the principle and spirit of the statute; and to apply such words to a case in which no opportunity may occur of enforcing the right for perhaps twenty, thirty, or forty years, would seem to be a total departure from the intention of the Legislature." And this view, Kelly, C.B., pointed out, is supported by the difficulty observed upon in *Owen* v. *De Beauvoir*, that, if time runs against heriots, it must, under the words of the statute, run against them from the moment when the last heriot was taken. Upon the whole, while the Court considered that, even if the statute applied to heriots, a right to seise heriots was not barred, yet it was thought that they were excluded by the whole purport of the Act of 1833 from sects. 2, 3, and 34.

Periodical Sums charged on Land.

Periodical sums charged upon or payable out of land.

The definition clause extends the term "rent" to "all annuities and periodical sums of money charged upon or payable out of any land (except *moduses* or compositions belonging to a spiritual or eleemosynary corporation sole)." The nature of *moduses* and compositions has already been considered, and it was pointed out in *Payne* v. *Esdaile* (1888), 13 App. Cas. 613, that a *modus* was never charged upon or payable out of land in the sense that there was a remedy for it against the land itself. Hence, since *moduses* are treated as "charged upon or payable out of" land for the purpose of the definition, and are included under "rent" save where they belong to a spiritual or eleemosynary corporation sole, it follows, as was held in that case, that the phrase "charged on land" is to be taken in a popular rather than a technical sense; and a payment is charged upon land within the meaning of the definition where the occupier of the land can only enjoy it upon terms of becoming liable to the payment. Thus the annual payments or customary tithes imposed by 37 Hen. 8, c. 12, in respect of houses in the City of London, which are payable by the occupiers by reason of their occupation, are "charged on land," and are

liable to be barred as rent under the R. P. L. A., 1874, although they are not liable to be barred as tithes under the Tithe Prescription Act, 1832 (*supra*, p. 21).

Land tax redemption charge.

The definition covers annual sums charged on land under the Land Tax Redemption Act, 1802, s. 123, in favour of a person having a partial interest in the land (not being an estate of inheritance) who redeems the land tax; and the right to such sums is liable to be barred, notwithstanding that they are stated in the statute to be payable by way of interest, and might therefore conceivably be subject only to the six years' limitation on arrears of interest: *Skene* v. *Cook*, [1902] 1 K. B. 682, C. A.

Tithe rent-charge.

Tithe rent-charge is a species of property distinct from a composition, and is not within the exception of compositions belonging to spiritual and eleemosynary corporations sole. Consequently tithe rent-charge is always liable to be barred by non-payment, though when it belongs to such a corporation sole the periods of limitation are those prescribed by sect. 29 of the R. P. L. A., 1833 (*supra*, p. 12): *Irish Land Commission* v. *Grant* (1884), 10 App. Cas. 14, p. 31. *Moduses* and compositions, when they consist of periodical sums charged on land, are also liable to be barred, provided they do not belong to a spiritual or eleemosynary corporation sole.

Annuities charged on land.

Formerly an annuity charged the person of the grantor only (Co. Litt. 144 b), and was recoverable by writ of annuity; while a rent-charge was recoverable either against the land, by distress or assize, or, at the election of the grantee, by writ of annuity: Litt., sect. 219; Co. Litt. 144 b; Gilbert on Rents, pp. 92 *et seqq.* Frequently, however, annuities are charged upon land, and then they are rent-charges. Powers of distress and entry may be expressly attached to them by deed or will: *cf. James* v. *Salter* (1836), 2 Bing. N. C. 506; and in the case of instruments coming into operation after 31st December, 1881, such powers are conferred by sect. 44 of the Conveyancing Act, 1881. And since the remedy by assize is abolished, an action of debt can be brought against the person in enjoyment of the land: *Thomas* v. *Sylvester* (1873), L. R. 8 Q. B. 368.

Annuities barred as "rent."

For the purpose of the statute each instalment of the annuity might be regarded as a sum of money charged on land, the right to recover which would be barred in twelve years from its falling due: R. P. L. A., 1874, s. 8; *infra*, p. 151. Failure to enforce payment of any particular instalment would not, on this view,

prejudice the right to recover subsequent ones. But the correct view is that an annuity charged on land is rent, so that the right to recover the annuity as such is liable to be barred under the R. P. L. A., 1874, s. 1, in twelve years from the last payment: *Dower* v. *Dower* (1885), 15 L. R. Ir. 264; *Re Nugent's Trusts* (1885), 19 L. R. Ir. 140. So long as the annuity itself is in existence, arrears for six years are recoverable: *infra*, p. 176. But when the statutory period has run against the annuity it is extinguished: R. P. L. A., 1833, s. 34; and at the same time the right to recover any arrears is gone: *Jones* v. *Withers* (1896), 74 L. T. 572, C. A.; *cf. Re Jolly*, [1900] 2 Ch. 616, C. A.; this was left open in *Re Nugent's Trusts* (*ubi supra*, p. 145); see also *Searle* v. *Colt* (1841), Y. & C. C. C. 36.

Personal remedy barred as well.

If the annuity is also secured by covenant, each failure to pay gives a fresh cause of action, and hence it was formerly held that the remedy on the covenant might subsist, though the right to recover the annuity out of the land was extinguished: *Manning* v. *Phelps* (1854), 10 Ex. 59. But in fact the extinction of the title to the annuity removes the subject-matter of the covenant and renders it unenforceable. The decision in *Sutton* v. *Sutton* (1882), 22 C. D. 511, C. A., though not directly applicable to the case, shows the unwillingness of the Court at the present time to allow the personal remedy to survive when the remedy against the land is gone. Moreover, if the annuity is charged on personal estate as well as on land, it is not kept alive as against the personal estate: *Re Nugent's Trusts* (*supra*); *Dower* v. *Dower* (*supra*).

Payment by surety.

But where instalments of the annuity have been paid by a surety, he is entitled to recover the specific sums with interest, and not arrears of the annuity as such: *Scottish Provident Institution* v. *Conolly* (1893), 31 L. R. Ir. 329.

Section III.—Present Interests.

The statute may begin to run against a person presently entitled to the possession of land or to receipt of a rent-charge (1) when he has been in possession of the land or in receipt of the rent, and has been dispossessed or has discontinued possession or receipt; (2) when his title has arisen, but he has failed to enter into possession or receipt.

Loss of possession and failure to take possession.

(1) *Dispossession of Land.*

The following clause defines the date of accrual of the right of action in the case of dispossession or discontinuance of possession of land:

> "When the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received."

R. P. L. A., 1833, s. 3, cl. 1. Dispossession.

Shortly stated, the rule is that when a person claiming land, or his predecessor in title, has, in respect of the estate claimed, been in possession of the land, and has, while entitled thereto, been dispossessed or has discontinued possession, the statute runs from the time of dispossession or discontinuance of possession; with the like provision for the case of a claim to a rent-charge.

(i.) *Possession by Agent.*

The phrase "in receipt of the profits" seems to have been intended to provide for the case of an owner being in receipt of the proceeds of land from a bailiff: see Lord St. Leonards' Real Property Statutes, p. 47; and, taken with sect. 35 of the Act of 1833, which makes the receipt of rent equivalent as against the tenant to receipt of profits, it would also prevent the statute running against a landlord. But for neither purpose are the

Possession by bailiff.

words necessary. The case of landlord and tenant is fully covered by sects. 7 and 8 of the Act of 1833, and by the principle that during the continuance of a term of years the landlord has no right to the actual possession; and the possibility of dispossession while a bailiff holds as such is excluded by the character of his possession. Where possession is held by a servant or bailiff, this is the possession of his employer, and there is no dispossession of the employer so as to make his right of entry accrue and the statute run: *Moore* v. *Doherty* (1845), 5 Ir. L. R. 449; *Allen* v. *England* (1862), 3 F. & F. 49. Hence the insertion of the phrase "in receipt of the profits" was unnecessary. Where possession is held by permission of the owner by a person who is not in the position of a bailiff or a guest, a tenancy at will is created, and the rule suitable to such a tenancy applies (*infra*, p. 97): see *Jack* v. *Walsh* (1842), 4 Ir. L. R. 254, a case of possession given to a mistress. Where the owner of a leasehold house allowed his sisters to reside therein, contributing to their support, and himself paying the rent, rates, and taxes, and executing the repairs, they were guests and not tenants at will: *Peakin* v. *Peakin*, [1895] 2 I. R. 359; *cf. Ellis* v. *Crawford* (1842), 5 Ir. L. R. 402.

Possession on behalf of infant.

A parent or other near relation entering on the land of an infant is deemed to enter as a bailiff, and the statute does not run: *Thomas* v. *Thomas* (1855), 2 K. & J. 79; *Pelly* v. *Bascombe* (1863), 4 Giff. 390; *Wall* v. *Stanwick* (1887), 34 C. D. 763; *MacCormack* v. *Courtney*, [1895] 2 I. R. 97; *Burnside* v. *Burnside*, [1906] 1 I. R. p. 218 *n.*, C. A. In such a case the possession remains non-adverse, even after the infant has attained twenty-one, until something has been done to change its character: *Hobbs* v. *Wade* (1887), 36 C. D. p. 557; *Tinker* v. *Rodwell* (1893), 69 L. T. 591; as where the infant has left home and has attained twenty-one, and has not for many years made any claim to the property: *Re Maguire and M'Clelland's Contract*, [1907] 1 I. R. 393, C. A. And the principle applies to a stranger —such as a purchaser—who enters with full notice of the infant's rights: *Young* v. *Harris* (1891), 65 L. T. 45; but not to an heir-at-law who enters without knowing that the land has been devised to an infant: *Lambert* v. *Browne* (1870), Ir. R. 5 C. L. 218.

Receipt of rents by agent.

Upon a similar principle a person who is in receipt of rents as agent cannot thereby gain a title against his principal. In

Ward v. *Carttar* (1865), 1 Eq. 29, a solicitor, who paid off a mortgage on his client's estate in order to facilitate a sale, and who, when the sale was not proceeded with, went into receipt of the rents, was held to be in receipt as agent, so that the statute did not run in his favour. And the agency will be taken to last until it can be shown to have in fact terminated: *Smith* v. *Bennett* (1874), 30 L. T. 100; as, for instance, by the principal's bankruptcy: *Markwick* v. *Hardingham* (1880), 15 C. D. p. 348, C. A.

Lyell v. Kennedy.

An agent purporting to act for an unknown owner is debarred from gaining a title under the statute, provided the owner is subsequently discovered and ratifies the agency. This was the ground of decision in *Lyell* v. *Kennedy* (1889), 14 App. Cas. 437. The action was commenced in 1881 to recover a mill and factory and about seventy cottages at Manchester. Ann Duncan took the property as devisee under the will of Lawrence Buchan, who died in 1859. She and Kennedy were executors of the will. Kennedy managed the property for Ann Duncan gratuitously, received the rents, and carried them to an account at the bank in the name of "the executors of Lawrence Buchan." Ann Duncan died in 1867 intestate as to realty in England. The property was at that time let on different tenancies, one annual and the others weekly, without writing. Till 1880 Kennedy continued to manage the property, giving receipts and paying in the rents exactly as before, the tenants apparently not being informed of the death of Ann Duncan. Kennedy repeatedly stated, orally and in writing, to Lyell and other persons that he was acting for the heir or heirs, whoever he or they might be, and that he was ready to account to him or them as soon as they were ascertained. In 1880 he claimed to be in receipt of the rents and profits for himself. Three sisters were found to be co-heiresses of Ann Duncan, and they assigned their interest to Lyell, who claimed the property. To this claim Kennedy pleaded the statute. It was held by the House of Lords that Kennedy's position as agent prevented his receipt of rents from being adverse to the heirs. "The respondent's acts," said Lord Selborne, "in so receiving the rents, could not, in my opinion, dispossess the heirs of Ann Duncan, so as to put them to their action, either under the 2nd and 3rd, or under the 8th section of the statute 3 & 4 Will. 4, c. 27. If he received on behalf of the heirs, and if they could and did adopt and ratify his agency, they were in, and never out of, possession": see also *Metcalfe*

v. *Fitzsimmons* (1889), 26 L. R. Ir. 29. *Lyell* v. *Kennedy* depended on the question, not of dispossession, but of the failure of the true owner to take possession; but in regard to the nature of possession held on behalf of another, the distinction is immaterial.

(ii.) *Possession by Co-owner.*

Co-ownership.

The rule previous to 1833, under which one co-owner in exclusive possession of land was deemed to possess on behalf of his co-owners, was abolished by sect. 12 of the Act of that year:—

R. P. L. A., 1833, s. 12. Possession by one co-owner.

> "When any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them."

Title acquired against other co-owners.

By virtue of this section a co-owner who occupies the whole, or any part exceeding his proper share, of the land, can acquire a title as regards the whole or such part to the exclusion of the other co-owners: *Ex parte Hasell* (1839), 3 Y. & C. 617; *Burroughs* v. *M'Creight* (1844), 1 Jo. & Lat. 290; *Sanders* v. *Sanders* (1881), 19 C. D. 373, C. A. As to co-parceners, see *Stewart* v. *Marquis of Conyngham* (1849), 1 Ir. Ch. R., p. 551. Moreover, where two co-owners enjoy their moieties separately, without any deed of partition, the effect of the statute is to vest in each, after the statutory period, a sole title to his moiety, inasmuch as the section applies to the case where a co-owner is in the exclusive possession of the entirety of any portion of the land: *Murphy* v. *Murphy* (1864), 15 Ir. C. L. R. 205, correcting *Tidball* v. *James* (1859), 29 L. J. Ex. 91. Consequently in this manner two joint tenants may sever the joint tenancy, so as to extinguish the right of survivorship. A partition by parol and separate possession cannot be questioned after twelve years: *Paine* v. *Ryder* (1857), 24 Beav. 151.

But where one co-owner who had been in receipt of the entirety of the rents from 1833 till his death in 1877, was shown to have accounted for a moiety to his co-owner from

1864 to 1877, it was held that this raised a presumption that he had accounted for the earlier rents, and he could not rely on the title of his co-owner having been already extinguished in 1864: *Sanders* v. *Sanders* (*supra*).

(iii.) *Dispossession and Discontinuance of Possession.*

Distinction between dispossession and discontinuance of possession.

The statute draws a distinction between dispossession and discontinuance of possession. When the existing possession of A. is terminated against his will by the entry of B., there is a case of dispossession. When A. voluntarily withdraws from possession, and then or subsequently B. enters and gains possession, there is a case of discontinuance of possession. "In my view," said Fry, J., in *Rains* v. *Buxton* (1880), 14 C. D. p. 539, "the difference between dispossession and discontinuance of possession may be expressed in this way—the one is where a person comes in and drives out the others from possession; the other case is where the person in possession goes out, and is followed into possession by other persons." But dispossession does not require the driving out of a possessor actually present on the land. Possession once acquired continues so long as it is supported by indications of occupation, although no person is on the land; and the entry of a stranger during the possessor's absence is then a dispossession and not a discontinuance of possession. Discontinuance of possession implies that all indications of occupation have been withdrawn. "It is difficult," said Bramwell, L.J., in *Leigh* v. *Jack* (1879), 5 Ex. D. at p. 272, "to suppose a case where it can be doubtful whether there has been a discontinuance of possession as to a house; if any chair or table, or other small article of furniture be left, there is strong evidence of intention that there shall be no discontinuance of possession; but it is possible to conceive a case of discontinuance of possession as to a piece of land where the former owner does nothing to it for the space of twenty years. . . . But, after all, it is a question of fact, and the smallest act would be sufficient to show that there was no discontinuance."

A new possession essential to discontinuance.

But A.'s withdrawal from possession, though it appears to satisfy the literal meaning of "discontinuance of possession," is not by itself sufficient for the purpose of the statute. Until some other person has entered there is no one against whom A.

can enforce his right of entry, or in favour of whom the statute can operate, and on these grounds it has been held that actual possession by a stranger is necessary to complete the discontinuance of possession. "The word 'discontinuance,'" said Blackburne, C.J., in *M'Donnell* v. *M'Kinty* (1847), 10 Ir. L. R. p. 526, "I understand to mean an abandonment of possession by one person, followed by the actual possession of another person. This, I think, must be its meaning; for if no one succeed to the possession vacated or abandoned, there could be no one in whose favour or for whose protection the Act could operate. To constitute discontinuance there must be both dereliction by the person who has the right, and actual possession, whether adverse or not, to be protected." And this opinion was indorsed by the English Court of Exchequer in *Smith* v. *Lloyd* (1854), 9 Ex. 562, where Parke, B., in delivering the judgment of the Court, said, "We are clearly of opinion that that statute [R. P. L. A., 1833] applies not to cases of want of actual possession by the plaintiff, but to cases where he has been out of and another in possession for the prescribed time. There must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute. We entirely concur in the judgment of Blackburne, C.J., in *M'Donnell* v. *M'Kinty*, and the principle upon which it is founded."

In *Trustees Agency Co.* v. *Short* (1888), 13 App. Cas. p. 799, the above cases were treated by the Privy Council as correctly stating the law. In the earlier case of *Doe* v. *Bramston* (1835), 3 A. & E. 63, it appears to have been considered that, where an owner abandons possession with no intention of returning, time will run against him forthwith. But this is inconsistent with the principle just stated. Whatever be the owner's intention, it is only the entry of a stranger that brings the statute into operation.

Mines. Questions of discontinuance of possession may arise in regard to mines, where the ownership of the mines has been severed from the ownership of the surface. The mere omission of the mine-owner to work the mines is no evidence of the abandonment of the right to work them: *Seaman* v. *Vawdrey* (1809), 16 Ves. 390; *Adair* v. *Shafto*, referred to in 19 Ves. p. 156. It may involve an abandonment of possession, yet this does not imperil the mine-owner's title so long as the

"discontinuance of possession" has not been completed by an effective occupation by a stranger; and possession must be actually gained over a definite portion of the *substratum*; it is not sufficient merely to work into the seam from adjoining mines: *Ashton* v. *Stock* (1877), 6 C. D. 719, 727; *Thompson* v. *Hickman*, [1907] 1 Ch. 550. Glyn v Howell 1909. 1 ch. 666.

Invalid transfer.

Discontinuance of possession, however, is not confined to the case where a mere stranger enters upon a vacant possession. Where A. purports to transfer the ownership to B., and lets him into possession, but for some reason the transfer is invalid, this is a discontinuance of possession by A., and the statute begins forthwith to run in favour of B. Thus, where a conveyance is void for non-compliance with the requirements of the Mortmain Act, the grantee will acquire a good title by the lapse of twelve years: *Churcher* v. *Martin* (1889), 42 C. D. 312.

(iv.) *Rules for Dispossession.*

Change of possession.

Possession is maintained by the exercise of acts of ownership over the land, and these may be acts of beneficial user, as the cultivation of the land, or acts of exclusion, as the maintenance of fences and barriers. But the acts of ownership need not be continuous, nor need they be in all cases even frequent. Regard must be had to the character of the land, and the purposes for which the owner requires to use it, and his possession is sufficiently maintained by the doing of such acts as, under the circumstances, might be expected. On the other hand, while an existing possession is easily preserved, an adverse possession must be marked by definite acts of ownership, and since no presumption is made in its favour, it extends only over the area which is effectively occupied. Under these circumstances it is frequently a question whether A.'s possession, which has been manifested by only slight acts of ownership, has been replaced by the possession of B., so as to constitute a case of dispossession. When, on the other hand, A. has ceased to exercise any acts of ownership at all, it has only to be determined whether B. has exercised such acts as to place him in possession, so as to constitute a case of discontinuance of possession.

The cases on the subject may be referred to the following rules:—

I. Regard must be had to the purpose for which A. desires to use the land, and though such user requires only slight acts upon the land, yet these will be enough to preserve the possession in A., unless the acts of ownership done by B. are inconsistent with A.'s user of the land for his intended purpose.

Tottenham v. Byrne.

In *Tottenham* v. *Byrne* (1861), 12 Ir. C. L. R. 376, B. was the owner of land on each side of a public road, the soil and freehold of which had been reserved on the grant of the land, and were vested in A. The road was at first used as a carriage road, but B. built a wall across it, leaving a stile for foot passengers, by whom it was thenceforth used. The evidence as to the date when the wall was built was conflicting, the evidence for A. putting it in 1843, that for B. in 1839. B. also levelled the fence on each side of the road, so as to throw the site of the road apparently into his own land. The question was whether this was a dispossession of A. by B. The majority of the Court held that it was. For pulling down the boundary walls and enclosing the roads, it was pointed out that A. could have sued in ejectment, and as this was a remedy intended to restore possession there must have been a dispossession. This, however, seems to beg the question. Pigot, C.B., took a different view. The erection of the wall by B. had not stopped the user of the road by the public, including tenants of A., who used it for fetching water from a well, and hence it had been actually used in the manner contemplated when the soil of the road was reserved. "The exception," said the Chief Baron, "being of land described as a road, what was contemplated by both parties (by the grantee of the soil, and the grantor who excepted it) was the use of the road *as such*; and so long as the road was used by the tenants of the grantor, or by the public, there was a use and enjoyment, *quoad hoc*, which, in my opinion, preserved the title in the grantor, and in those deriving under him, and which prevented the operation of ss. 2, 3, and 34" of the R. P. L. A., 1833. This view was adopted in the Exchequer Chamber, which reversed the decision, but the case there is not reported: see *Reilly* v. *Thompson* (1877), Ir. R. 11 C. L. pp. 247, 251.

Leigh v. Jack.

In *Leigh* v. *Jack* (1879), 5 Ex. D. 264, C. A., the soil of an intended street, and the land on either side of it, belonged originally to L., the plaintiff's predecessor in title. In 1854, L. conveyed to the defendant a plot of land on the south side of the street, upon which he built a factory. A conveyance of land upon the

north side was made in 1857, and in 1872 this also became vested in the defendant. The street was never dedicated to the public as a highway, and from 1854 the defendant had placed upon it materials used at his factory, so as to block it up except as against foot passengers. In 1865 he enclosed an oblong portion of it, and in 1872 he fenced in the ends. Previously to this the site of the intended street had been separated from another street, into which it led, by a fence consisting of posts and a swing rail; and this fence was repaired and renewed within twenty years of the action both by L. and by the defendant. The action was brought in 1876 by the tenant for life under L.'s will to recover possession of the site of the intended street.

The Court of Appeal (Cockburn, C.J., Bramwell and Cotton, L.JJ.) held that there had been no discontinuance of possession on the part of L. or the plaintiff, and it had to be determined, therefore, whether there had been a dispossession. It was held that there had not. Cockburn, C.J., and Bramwell, L.J., relied upon the acts of user by the defendant being of a merely temporary kind, and not inconsistent with the owner's enjoyment of the soil for the purpose for which it was intended. Cockburn, C.J., said: "I do not think that any of the defendant's acts were done with the view of defeating the purpose of the parties to the conveyances; his acts were those of a man who did not intend to be a trespasser, or to infringe upon another's right." And Bramwell, L.J.: "I do not think that there was any dispossession of the plaintiff by the acts of the defendant. Acts of user are not enough to take the soil out of the plaintiff and her predecessors in title and to vest it in the defendant; in order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it."

Re Vernon's Estate.

In *Re Vernon's Estate* [1901], 1 I. R. 1, land was taken by a Government Department, and the boundary line between the land taken and the remaining land was ascertained by an award. The officers of the department erected three posts outside their boundary, and then, when the posts fell into decay, erected two short walls on their site. Part of the land in the extra strip thus marked off was leased to the Admiralty, but no further acts were done by the department on the remainder. It was held that there had been no discontinuance of possession by the owner, except as to the part leased to the Admiralty. There can be no

discontinuance, it was said, without actual exclusion. But of course it is sufficient if, while the owner is not using the land, substantial ownership is exercised by the intruder.

Boundary Wall.

Inscription on boundary wall.

To this rule may be referred cases where possession of a boundary wall is retained by means of an inscription. Though the owner may have no occasion to use the wall, this assertion of his title will maintain his possession until there has been an actual possession taken by a stranger. In *Phillipson* v. *Gibbon* (1871), L. R. 6 Ch. 428, the wall formed one side of a house and fronted on a street. It contained a stone with an inscription dated in 1766, stating that the wall had been built by and belonged to the East India Company, who had thrown the adjoining ground into the street. Soon after 1831 the tenant of the house, who did not hold under the company, rebuilt the wall in pursuance of a covenant in his lease, and replaced the stone. It was held that the stone was enough to save the possession of the company. "Where," said James, L.J., "there is a boundary wall, and that boundary wall remains undisturbed, and an inscription is allowed to remain on it which states to all the world that it is the boundary wall of the adjoining proprietor, it seems to us idle to suppose that any question of the Statute of Limitations, or of adverse possession, or of cesser of possession, could properly arise." The replacing of the stone was in effect an admission by the tenant that by rebuilding the wall he did not mean to interfere with the possession.

Phillipson v. *Gibbon.*

Waddington v. *Naylor.*

And where A. and B. were the owners of two adjoining houses, and A. for the purpose of raising his house built upon the wall, belonging to B., of B.'s house, it was held that this was at the utmost a case of easement; that the additional wall belonged, immediately on the building of it, to B.; and that, as A. had not subsequently done any act to put himself in exclusive possession, he had not gained a title to the wall against B.: *Waddington* v. *Naylor* (1889), 60 L. T. 480.

Stedman v. *Smith.*

In *Stedman* v. *Smith* (1857), 8 E. & B. 1, on the other hand, it was held that dispossession had been effected. The plaintiff and defendant occupied adjacent plots of ground, divided by a wall of which they were tenants in common. There was a shed on the defendant's ground contiguous to the wall, the roof of

which rested on the top of the wall across its whole width. The defendant took the coping stones off the top of the wall, heightened the wall, replaced the coping stones on the top, and built a washhouse contiguous to the wall, where the shed had stood, the roof of the washhouse occupying the whole width of the top of the wall; and he let a stone into the wall, with an inscription on it stating that the wall and the land on which it stood belonged to him. It was held that there was evidence of actual ouster such as would sustain an action of trespass by one tenant in common against another, and apparently, too, there was a dispossession such as to make time run under the statute.

II.—Even though A. is not actually using the land, B.'s acts of ownership will not exclude A. and transfer the possession to B., unless they are accompanied by an intention to possess—an animus possidendi.

There is no such *animus possidendi* where the acts can be referred to some right short of ownership, as where they only involve a claim to an easement. In *Littledale* v. *Liverpool College*, [1900] 1 Ch. 19, C. A., a narrow strip of grass-land led from a public road between two fields formerly belonging to A., the defendants' predecessor in title, to a field belonging to B., the plaintiffs' predecessor in title, who had a right-of-way over it. A conveyance of the latter field in 1843 showed the strip on the plan, but did not convey it, and it was admitted that the title to the strip had, on the deeds, been in A., and would then be in the defendants; but the plaintiffs claimed to have gained a title by possession. A. had had no occasion to use the strip, but some thirteen or fourteen years before the action he had told the tenant of one of his fields to pull down part of the fence between the field and the strip, asserting that the strip was his. No further act of ownership was shown on the part of A. or the defendants, but Lindley, M.R., considered that, since the defendants had not had occasion to use the land, discontinuance of possession was not to be inferred. The question was whether there had been actual possession by the plaintiffs.

Littledale v. *Liverpool College.*

To establish this the plaintiffs relied chiefly on the fact that many years ago they had put up two gates, one at either end of the strip, and had kept them locked. Lindley, M.R., held, however, that this might well have been done for the purpose of protecting the strip and the right of way from public invasion,

and that, under the circumstances, it did not show an intention to exclude the owner. Possession, he pointed out, involves an *animus possidendi*—*i.e.* an occupation with the intention of excluding the owner as well as other people. In other words, the putting up of the gates was referable to the right of way and was not evidence of possession, as it would have been in the case of a stranger. There were other acts upon which reliance was placed—the grazing on the strip, the clipping of the hedges, and the putting up of a telegraph pole—but the Master of the Rolls regarded these as unimportant, observing, as to the grazing, that it was by horses and cattle lawfully on the strip. Jeune, B., though with some hesitation, and Romer, L.J., agreed with the Master of the Rolls, the former remarking that, in the absence of a right of way, the putting up of the gates and locking them would have been the strongest possible assertion of a right of ownership; see *Seddon* v. *Smith* (1877), 36 L. T. 168, C. A.

Philpot v. *Bath.*

Similar to the above case was *Philpot* v. *Bath* (1905), 21 T.L.R. 634, C. A., where the land of the defendant adjoined foreshore vested in the plaintiff. The predecessor in title of the defendant had placed rocks and piles on the foreshore to protect a house built on his own land from the encroachment of the sea. It was held that in so doing he had no intention to claim ownership, and consequently there had been no dispossession of the plaintiff. He had acquired only an easement of support; see, too, *Duke of Beaufort* v. *Aird* (1904), 20 T. L. R. 602.

Licensees.

To this head may be referred cases where an owner in possession of land allows another to enter as licensee—that is, for a particular purpose which does not involve the exclusive possession of the land. The licensee will not gain a title under the statute: *Bobbett* v. *South-Eastern Ry. Co.* (1882), 9 Q. B. D. 424, 430; see *London and North-Western Ry. Co.* v. *Buckmaster* (1875), L. R. 10 Q. B. 444.

III.—If A. is not exercising any acts of ownership, it is immaterial whether the case is regarded as one of dispossession, or discontinuance of possession. B. will acquire possession, and the statute will run in his favour, if he exercises acts of ownership which definitely mark him as occupier; otherwise, if his acts fall short of this.

Cases of dispossession.

In addition to the *animus possidendi*, B. must have definite physical control. He then possesses *animo et corpore*. In the following cases dispossession was held to have been effected:—

Smith v. *Stocks*.

In *Smith* v. *Stocks* (1869), 17 W. R. 1135, a gravel pit had in 1804 been allotted by Inclosure Commissioners to the surveyors of highways. The surveyors had at first got gravel from the pit, but in 1837 they ceased to do this and procured gravel elsewhere. The pit was then filled up and taken into cultivation by the tenants of the owner of the adjoining land, and it remained in their occupation for over twenty years. This, it was held, was an actual possession on behalf of the adjoining owner which had extinguished the title of the surveyors: *cf. Seddon* v. *Smith* (1877), 36 L. T. 168, C. A.

Norton v. *L. and N. W. Ry. Co.*

In *Norton* v. *London and North-Western Ry. Co.* (1879), 13 C. D. 268, C. A., the company had taken land, and had fenced it off from the adjoining land by a post and rail fence. Inside this, on their own land, they planted a quick hedge, leaving between the hedge and the fence a strip of land 4 feet 6 inches wide. As the hedge grew up, the fence was allowed to fall into decay, and about the year 1846 it was removed by the occupier of the adjoining land. From the year 1854 until the commencement of the action in 1875 the strip of land was occupied and cultivated with the remainder of the field in which it lay, partly as arable land and partly as garden ground. The railway company in no way interfered with it, except that their workmen went upon it to trim the hedge. The Court of Appeal held that there was a complete case of possession by the owner of the field sufficient to extinguish the title of the company. And possession may be gained as against a railway company to the surface of land, although a tunnel beneath it remains in the occupation of the company: *Midland Ry. Co.* v. *Wright*, [1901] 1 Ch. 738.

Haigh v. *West*.

In *Haigh* v. *West*, [1893] 2 Q. B. 19, C. A., a public highway had been set out by inclosure commissioners about 1778. The site of the highway was within a manor, but beyond this there was nothing to show in whom was the title to the soil before it was set out. From 1778 the highway, which was in grass, was let by the vestry to persons who paid for the hire of it and depastured it, the money being paid to the surveyor of highways and applied to parish purposes. In 1891 the lord of the manor, who was also the owner of allotments adjoining the highway, claimed the soil. The case against him turned partly upon the presumption of a grant to the vestry, but it was held by the Court of Appeal that, apart from this, the vestry had gained a title by the Statute of Limitations, subject to the

public right of way. It is to be noticed that, under 59 Geo. 3, c. 12, s. 17, the churchwardens and overseers can hold land on behalf of the parish, and the Court saw no legal difficulty in their gaining a title by possession.

No dispossession.

In the following cases no adverse possession was gained:—

Scarby v. *Tottenham Ry. Co.*

In *Scarby* v. *Tottenham Ry. Co.* (1868), L. R. 5 Eq. 409, a public road had been constructed by trustees under the powers of an Act of Parliament. They separated it from an adjoining field by a hedge and a bank, and on the field side of these—but upon land belonging to themselves—they made a ditch three feet wide. The case related to the site of the ditch. The evidence showed that in course of time it had become filled up and obliterated, and had never been reopened by the trustees. The owners of the field had always included the hedge in their leases, and the tenants had used the strip within the hedge as part of their field for much more than twenty years, and at their own expense had trimmed the hedge on both sides. During the same time the trustees had not interfered in any way with the site of the ditch. But Wood, V.-C., held that no act adverse to the trustees had been done. The occasional clipping of the hedge was no such act, nor was the circumstance of cattle wandering over the site of the ditch, after it had been filled up, sufficient to raise the statute against the trustees. It was very little that they, as the actual possessors, could do to the land, and the adjoining owners had not definitely appropriated it either by inclosure or by clear acts of ownership.

Re Duffy's Estate.

In *Re Duffy's Estate*, [1897] 1 Ir. R. 307, in C. A. p. 315, land had been in 1863 compulsorily taken by a railway company. In 1875 the railway was finished, but it was defective, and was never used for public traffic. The railway company made no use of it, and the rails were partly torn up. The public, including the owners of adjacent quays, passed over the line as they wished. A tenant of the former owner of the land was in the habit of carting his goods over it. It was held that neither the original owner, nor the occupiers of the quays, had acquired a title under the statute. Although there might be absence of possession by the company, yet no actual exclusive possession had been acquired by any one else. With respect to the tenant, it was pointed out that he had a right under the railway Act not to have his communications interrupted.

IV.—Provided that the new possessor has clearly occupied the premises, slight acts on the part of the previous possessor will not prevent the dispossession, if, under the circumstances, they are explicable as being done by permission, or in some other way not importing the continuance of possession.

Marshall v. *Taylor.*

In *Marshall* v. *Taylor*, [1895] 1 Ch. 641, C. A., there were acts of actual user sufficient to give a possessory title. A. and B. were owners of adjacent houses. The gardens were formerly separated by an open ditch, and on A.'s side of the ditch was a hedge. The origin of the ditch was not known. If it was artificial, then according to the usual presumption it belonged to A., the owner of the hedge: *Vowles* v. *Miller* (1810), 3 Taunt. 137; *Guy* v. *West* (1808), cited 2 Selw. N. P. 1244; if it was not artificial, it was doubtful whether this rule of presumption applied: see *per* Lindley, L.J., at p. 647. In 1868 A. laid drain-pipes along the ditch, into which he allowed the drainage of both houses to run, and he covered in the ditch. Subsequently the surface of the ditch was used by B. as part of his garden. More than twelve years before the action B. paved part of the surface with cobble stones, and laid cinders on part; on other parts he planted a rose garden and made a fowl-house. But A. continued to cut his hedge from B.'s side, and twice opened the ditch to clean out the drains. It was held by the Court of Appeal that, assuming A. to have been the owner of the ditch, the acts done by B. were sufficient to dispossess him. The case was regarded as nearer to *Norton* v. *London and North-Western Ry. Co.* (*supra*) than to *Leigh* v. *Jack* (*supra*), and it was suggested that the acts done by A. were either by permission, or were referable to an easement to go on B.'s land to trim the hedge and clean out the drain.

V.—If the new possession has been taken adversely to the former possessor, it extends only over the area which has been actually occupied. User of part of the property does not in such a case raise a presumption of possession of the whole; otherwise where the new possession is with consent.

M'Donnell v. *M'Kinty.*

In *M'Donnell* v. *M'Kinty* (1847), 10 Ir. L. R. 514, a grant of lands was made in 1738 with a reservation to the grantor of mines, minerals, and quarries. From that time until the date of the action the grantor and his successors in title did not

make any claim to, or work, or use the quarries; but it appeared that persons claiming under the grantee had opened and worked quarries in some places, and had ground limestone and burnt it for the use of their lands. It was held that this partial user of the quarries did not confer possession of the whole, so as to extinguish the title under the reservation. "Such a presumption of law," said Blackburne, C.J., "is never made but in favour of right."

Effective possession of mines.

This refusal of the law, in the absence of title, to raise from possession of part of land a presumption of possession of the whole makes it difficult to gain a title to mines under the statute, and in general a stranger only acquires possession of the coal he actually severs: *Earl of Dartmouth* v. *Spittle* (1871), 19 W. R. 444; but it may be possible for him, by sufficiently marking out the area of his occupation, to acquire possession of an entire seam. "I can well understand," said Hall, V.-C., in *Ashton* v. *Stock* (1877), 6 Ch. D. 719, "that there might be cases in which, from the manner of working coal, a person who began to work it, and was a mere wrongdoer and trespasser, might have acquired a title to a certain seam or area of coal, and that, by the mode of driving the levels and opening a certain area of coal, there might have been possession acquired to the whole thing as a mine, or as a seam of coal, and not merely to the particular quantity of coal that was actually hewn and gotten." It is to be noticed that ignorance on the part of an owner, whether of his right (*Daukins* v. *Lord Penrhyn* (1877), 6 C. D. p. 324, C. A.), or of the infringement of his right (*Rains* v. *Buxton* (1880), 14 C. D. p. 540), does not prevent the operation of the statute; and a mine-owner may thus lose his title without being aware that the statute was running against him, though as little effect as possible will be given under such circumstances to acts of adverse user. Trespasses committed underground and without the knowledge of the owner of the property "have not the same legal effect as an adverse possession of the surface": *Earl of Dartmouth* v. *Spittle* (19 W. R. p. 445).

Possession with consent.

On the other hand, the presumption in favour of possession will be made where the possessor, although in consequence of a defect in the conveyance he obtains no title, yet enters into possession with the consent of the previous possessor. In such a case his entry on part of the mine will give him possession of all which his predecessor held.

In *Low Moor Co.* v. *Stanley Coal Co.* (1876), 34 L. T. 186, C. A., certain lands were vested in D. By an indenture of 12th July, 1834, he granted, bargained, and sold all the minerals lying under the lands to H. The indenture was not enrolled as a bargain and sale, and there was no livery of seisin to make it operate as a feoffment. There were seven seams of coal and minerals lying under the lands, and soon after the execution of the indenture H. began to work and get the coal, and continued to do so between 1834 and 1844. He did not, however, go below the first two seams of coal, and, on his ceasing to work in 1844, he left tramways and implements in the tunnels and levels he had made, so that he could, if he chose, have resumed working at any time. In 1855 H. by deed conveyed the minerals (except the two first or upper seams) to the plaintiffs, who shortly after entered, and bored down below the two first seams, in order to try for coal, but they did not work the coal. In 1872 the defendants entered and worked the coal in the lower seams, claiming through D. all the seams and beds of coal under the lands, subject to such right or interest as legally passed to H. under the indenture of 12th July, 1834. *Low Moor Co. v. Stanley Coal Co.*

It was held, in trespass brought by the plaintiffs, that H., by entering under the deed of 1834, had obtained possession of the whole of the seams as tenant at will to D., and, the statute running from the end of the first year, his title was complete in 1855. "It is true," said Cairns, L.C., "that in cases where a man has entered upon and taken possession of one seam of coal, and by lapse of time has acquired some title to it, the law will not assume that his possession extends to all the other seams of coal lying under that particular one; but in the case we have before us it was beyond all doubt intended that Holroyd should have possession, and take possession of all the seams." And see *Churcher* v. *Martin* (1889), 42 Ch. D. 312 (*supra*, p. 35).

Unless there has been a severance in title between the surface of land and the subjacent mines, possession of the surface gives possession of the mines, even though the possessor may not be entitled to work the latter: *Lewis* v. *Branthwaite* (1831), 2 B. & Ad. 437. In *Keyse* v. *Powell* (1853), 2 E. & B. 132, B. was yearly tenant of copyhold lands under which was an unopened mine, and, since the mine had not been reserved, he was in possession of it. In 1821, during this tenancy, the copyholder demised the mine to B. and P. for ninety-nine years, but no *Keyse v. Powell.*

entry was made under the demise. In 1832 the yearly tenancy was determined, and the surface of the land was delivered up to the copyholder. It was held that the possession of B. under the tenancy enured in 1821 for the benefit of himself and P., so that they were then in possession under the lease; and, assuming that the delivery of possession of the surface in 1832 carried with it possession of the mine, yet the statute ran against the right of entry under the term only from 1832, and not as was contended by the copyholder, from 1821. Consequently the assignee of the term was entitled to enter and work the mine in 1847. The statute, which had been pleaded by the copyholder, was thus no bar. The Court also held that the possession of the mine did not pass to the copyholder in 1832, but was throughout in B. and P. and their assignee.

(2) *Discontinuance of Receipt of Rent.*

Statute runs from last receipt.

Under sect. 3, clause 1, of the Act of 1833 (*supra*, p. 29) the statute runs in the case of a rent-charge, not from the date when the right to the rent is in fact violated by an omission to pay on the part of the person liable, but from the last receipt of the rent; so that, in the case of rent payable annually, the period of limitation is in effect reduced from twelve to eleven years: *Owen* v. *De Beauvoir* (1847), 16 M. & W. 547. But a judgment for recovery of arrears of a rent-charge has been held, on the analogy of *Heath* v. *Pugh* (1881), 6 Q. B. D. 345, C. A.; 7 App. Cas. 235; *infra*, p. 87, to stop the statute and give to the person entitled a fresh period of twelve years to recover the rent-charge: *Irish Land Commission* v. *Junkin* (1888), 24 L. R. Ir. 40; provided that at the date of the judgment the rent-charge is not already barred: *Irish Land Commission* v. *Ryan*, [1900] 2 I. R. 565, C. A.

Payment of rent out of part of land.

Where a rent, which is charged upon several parcels of land, has for upwards of twelve years been paid out of part of the land only, there is no discontinuance of receipt as to the other part so as to discharge it from liability. "A rent-charge is entire, and issues out of all and every portion of the premises charged; it is therefore an error to say that it has not been received or levied out of one portion of the premises, when it has been duly received during the whole period. The owner cannot apportion the rent, and when it is paid by the occupier of one portion of the premises, it cannot be levied out of any

other": *per* Crompton, J., in *Woodcock* v. *Titterton* (1864), 12 W. R. 865. In that case a rent charged on a farm, consisting of a farmhouse and several fields, had been for upwards of thirty years paid by the occupier of the farmhouse. During that period an outlying field belonging to the farm had been cut up for building and sold in lots to different persons. The plaintiff was the owner of a house erected on one of the lots, and the land on which it was built had been in separate ownership for upwards of twenty years. During that period no acknowledgment of the title to the rent was ever made by the owner of the house. Ultimately the defendant, the owner of the rent, claimed the rent from the plaintiff and distrained on the goods in the house. The Court (Cockburn, C.J., Crompton, Blackburn, and Shee, JJ.) were clearly of opinion that the right to distrain for the rent on this portion of the premises was not barred: *cf. Warren* v. *Bateman* (1841), Fl. & Kelly, 448.

Similarly in *Conolly* v. *Gorman*, [1898] 1 I. R. 20, C. A., where tithe rent-charge was charged on land held by different purchasers, the tithe rent-charge owner was not bound to look to the purchasers for separate amounts, and, consequently, payment by any one saved the title to the rent-charge as against all. The case is still clearer where on the sale of part of the land the vendor has agreed to indemnify the purchaser against the rent. If the vendor continues to pay it he does so as agent for the purchaser, and there is no discontinuance of receipt of the rent as regards the purchaser's part of the land: *Archbishop of Dublin* v. *Coote* (1849), 12 Ir. Eq. R. 251.

Payment by assignor after assignment of entire land.

Where there has been an assignment of the entire land, but the rent continues to be paid by the assignor, it would seem upon principle that, in the absence of an agreement by the assignor to indemnify the assignee, there is a discontinuance of the receipt of the rent on the part of the owner of the rent-charge, so as to make the statute run against him and in favour of the assignee of the land. The assignor becomes, upon the assignment, a mere stranger as regards the land, and a payment made by him cannot be regarded as a payment of rent issuing out of the land. There is, therefore, a discontinuance of receipt on the part of the rent-charge owner, and the statute should run. It was considered, however, in *Adnam* v. *Earl of Sandwich* (1877), 2 Q. B. D. 485, that, in the absence of knowledge on the part of the rent-charge owner of the change of title to the land, this

would not be so, and that the statute would not run against the rent-charge owner, inasmuch as there had been no negligence on his part in enforcing his remedy; and this reasoning was adopted in *Irish Land Commission* v. *White*, [1896] 2 I. R. 410. But while the presumed negligence of the owner who remains out of possession is doubtless one of the reasons on which Statutes of Limitation as a matter of general policy are based, the application of the statutes in particular cases does not depend upon this consideration; and, apart from concealed fraud, it is immaterial whether the owner has been aware or not of his rights, or whether he is fairly chargeable with negligence in enforcing them. It is sufficient that he has been, in fact, not enjoying them, and that a corresponding benefit—whether in the form of possession of land, or receipt of a rent-charge, or non-payment of a rent-charge—has been enjoyed adversely by another. The land may have been again assigned upon the footing of its being free from the rent-charge, and the main object of the statute is to quiet the existing possession.

Adnam v. *Earl of Sandwich.*

But *Adnam* v. *Earl of Sandwich* was also decided upon the ground of indemnity. Land subject to a fee-farm rent was in 1812 conveyed by A. to B. From 1812 to 1872 the rent was paid by A. and his successors in title notwithstanding that they had no interest in the land. The rent-owners were ignorant of the conveyance to B. In 1872 A.'s successor in title refused to continue the payment of the rent, and the rent-owner sought to enforce it against the then owner of the land. As just stated, the Court (Mellor and Field, JJ.) considered that the rent had not been extinguished because there had been no default on the part of the owners of the rent; but they also held that under the circumstances it must be presumed that, on the conveyance of the land, there was an arrangement that A. should indemnify B. against the rent, and consequently A. and his successors were to be regarded as having made the payment as agents for B. and his successors. Upon this footing the rent had, of course, as in *Archbishop of Dublin* v. *Coote* (*supra*), been regularly kept alive. But there seems to have been very little reason for presuming such an arrangement, and it would not be safe to rely upon a similar presumption being made in other cases. It appears to be incumbent upon a rent-charge owner to secure his title by ascertaining from time to time that the person who pays him the rent is entitled to discharge this burden on the land.

(3) *Failure to take Possession.*

Failure to take possession.

There may be a failure to take possession of land, or to enter into receipt of a rent-charge, on the part of the owner of the land or the rent, either (*a*) where such owner becomes entitled on the death of his predecessor in title who had remained in possession or receipt up to the time of his death; or (*b*) where such owner becomes entitled upon a conveyance *inter vivos*. In the first case his right is deemed to accrue at the time of the death; in the second case, at the time when he becomes entitled to possession or receipt under the conveyance; and, if he fails to take possession or enter into receipt, the statute will, as from such dates, run against him. These cases are provided for by clauses 2 and 3 of sect. 3 of the Act of 1833:—

R. P. L. A. 1833, s. 3, clause 2. Upon death.

"When the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death.

Clause 3. Upon alienation.

"When the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being, in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument."

Estate of predecessor and successor must be the same.

The clauses require that the predecessor shall have been in possession in respect of the same estate or interest as that which the successor claims, and hence they do not apply in the case of derivative interests carved by will or deed out of a greater interest: *James* v. *Salter* (1837), 3 Bing. N. C. 544; *contra*, Lord St. Leonards' Real Prop. Stat., p. 21. Claims in respect of such derivative interests, therefore, are governed by the general provision of sect. 1 of the Act of 1874: *Langton* v. *Langton* (1854), 18 Jur. 928; *Magdalen Hospital* v. *Knotts* (1878), 8 C. D. p. 727, C. A.; *Pugh* v. *Heath* (1882), 7 App. Cas. p. 238.

Effect as to rent-charges.

The distinction is of practical importance with regard to rent-charges, since the time of accrual of the actual remedy does not accord with the time prescribed by sect 3. Thus if A. has continued in receipt of a rent-charge until his death, and his whole estate or interest therein devolves upon B., time will run against B. from the death, and not from the date when the rent next falls due and is not paid. But if B. takes a rent-charge newly created by A.'s will, or if he takes a particular estate in A.'s existing rent-charge, sect. 3 is excluded, and, under the general principle of sect. 1 of the Act of 1874, time does not run until, upon failure to pay the rent, a right of action or of distress accrues. Similar considerations arise upon the creation *inter vivos* of a rent-charge, or a grant of a particular estate in an existing rent-charge.

Effect of vacant possession.

In the case of land, it has further to be noticed that sect. 3 appears to make time run from the death, or from the grant, even though the possession remains vacant: see Hayes' Conveyancing, I. 248. This, however, is opposed to the principle that the statute only runs where there is a person in whose favour it can run: see *M'Donnell* v. *M'Kinty* (1847), 10 L. R. Ir. 514; *Smith* v. *Lloyd* (1854), 9 Ex. 562; *Trustees Agency Co.* v. *Short* (1888), 13 App. Cas. p. 799; and it seems correct to say that the statutory period will only be reckoned from the commencement of an adverse possession. Upon a devise or grant of a limited estate created out of the devisor or grantor's estate, the difficulty would not arise, since sect. 3 does not apply to such a case, and, in accordance with the general principle, the statute would not run till entry by a stranger.

Effect of subsisting tenancy.

Clause 2 supposes the deceased person to have been in actual possession at the time of death. Where land is in the possession of a tenant, and the landlord dies, the operation of the statute against his successor in title does not depend upon this clause, but upon sects. 7 to 9 of the same Act: *Baines* v. *Lumley* (1868), 16 W. R. 674.

Title of administrator.

An administrator's right of entry on leaseholds does not accrue till the grant of administration, and though, for some purposes, his title is held to relate back to the death of the deceased—so that, for instance, he can maintain trespass (*Thorpe* v. *Stallwood* (1843), 5 Man. & Gr. 760), or bring an action on a contract (*Foster* v. *Bates* (1843), 12 M. & W. 233), in respect of matters between the death and the grant—yet for

the purpose of the Statute of Limitations, time did not formerly run against him as regards leaseholds (*Stanford's case*, cited in *Saffyn* v. *Adams* (1602), Cro. Jac. p. 61), and does not now run against him as regards actions of tort and contract (*Murray* v. *East India Co.* (1821), 5 B. & A. 204; *infra*, p. 205), until the grant. This is upon the general principle that a cause of action cannot be said to accrue, and consequently time does not run, until there is some person who can sue. As regards leaseholds, however, the law was altered by sect. 6 of the R. P. L. A., 1833:—

R. P. L. A., 1833, s. 6. Administrator.

> "For the purpose of this Act an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration."

Consequently time runs against an administrator in respect of leaseholds as though the grant had followed immediately on the death: *Re Williams* (1886), 34 C. D. 558.

Executor.

As regards an executor, no such enactment is required, since the property of the deceased vests in him upon the death: *Woolley* v. *Clark* (1822), 5 B. & A. 744. In each case, however, the operation of the statute is subject to the general principle that there must be some person in possession in whose favour it can run: *supra*, p. 10.

Section IV.—Future Interests.

(1) *Statute runs from Interest falling into Possession.*

Right of entry accrues on estate falling into possession.

The right of entry or action in respect of a future estate or interest is not deemed to accrue, and the statute, therefore, does not run, until the estate or interest falls into possession. This is provided by clause 4 of the R. P. L. A., 1833, s. 3, while the operation of the rule is further defined by other enactments referred to subsequently. Under the previous statute (21 Jac. 1, c. 16), the same result followed from the provision that time should run from the accrual of the right of entry: *Doe* v. *Scott* (1825), 4 B. & C. 706.

R. P. L. A., 1833, s. 3, clause 4. Future interests.

> "When the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession."

Alienation by tenant for life.

It follows that where a life tenant purports to convey the fee, and the grantee enters, the statute does not run against the remainderman until the death of the life tenant: *Doe* v. *Rolfe* (1838), 8 A. & E. 650. In the similar case of *Jumpsen* v. *Pitchers* (1843), 13 Sim. 327, a husband, seised in fee of land in right of his wife, in 1772 conveyed the land to a purchaser by a deed ineffectual to bind the wife's interest. It passed, however, to the purchaser the husband's estate during the coverture, and the wife's interest was turned into a future estate. Against her, therefore, the statute did not begin to run until her estate fell into possession on the determination of the coverture.

Doe v. *Liversedge.*

In *Doe* v. *Liversedge* (1843), 11 M. & W. 517, lands were in 1798 conveyed to a husband and his wife, and to the heirs and assigns of the husband. The husband absconded in 1805, and was made bankrupt in 1807. The wife remained in possession till her death in 1841. It was held that the husband's remainder in fee was distinct from his life estate, and since it

continued to be a future interest till 1841, the assignee in bankruptcy was then entitled to claim it.

Mortgage of reversionary interest.

Where a mortgage, whether legal or equitable, is created on a reversionary interest in land, time runs against the right to foreclose only from the date when the interest falls into possession; for though the mortgagee can bring a foreclosure action, and procure the extinction of the equity of redemption, while the interest is still reversionary, he does not thereby assert any right to possession of the land. If he defers foreclosure till the interest has fallen into possession, his action is then an action to recover the land, and comes within the rule as to future estates: *Hugill* v. *Wilkinson* (1888), 38 C. D. 480; *cf. Re Conlan* (1892), 29 L. R. Ir. 199; *Re Lake's Trusts* (1890), 63 L. T. 416; and see *infra*, p. 87. So, too, where an annuity is secured by a term granted by a reversioner upon a life estate, the statute does not run against the term, and consequently against the enforcement of the security, until the determination of the life estate: *Snow* v. *Booth* (1856), 8 D. M. & G. 69.

Reversion on trust or mortgage term.

The reversion upon a term of years is, so far as the right to possession of the land is concerned, a future interest, and the statute does not begin to run against the reversioner until the reversion falls into possession by the expiration of the term. This general rule is subject to the special provision of sect. 9 of the R. P. L. A., 1833, in the case of adverse receipt of rent. But a term created by way of security for money stands upon a special footing. Until it is enforced and possession is taken under it, the person in whom the land is vested subject to the term is entitled to possession, and, if he fails to enter, or is dispossessed, the statute runs against him. Thus in *Twaddle* v. *Murphy* (1881), 8 L. R. Ir. 123, the existence of a jointure term, which had never been put into operation, did not prevent time from running against the owner of the estate subject to the term. His estate was to be treated as an estate in possession, until, by possession being taken under the term, it became in fact an estate in reversion.

Humble v. *Humble.*

This distinction appears to account for the decision in *Humble* v. *Humble* (1857), 24 Beav. 535, where mortgagees of an estate, which was subject to a term of 5000 years vested in trustees to pay debts and legacies, were held to be barred by non-payment of interest and want of acknowledgment from 1807 to 1841. Possession had not been taken under the term,

and the mortgaged interest was therefore not treated as a future interest.

Possession taken under term.

In *Re Bermingham's Estate* (1870), Ir. R. 5 Eq. 147, C. A., an owner in fee created in 1812 and 1814 respectively two terms of 200 years and 500 years to secure annuities. In 1822 the first annuitant filed a bill to raise his arrears, and in 1828 a receiver was appointed. This was equivalent to taking possession under the first term, and the interest of the annuitant in the second term thereupon became a future interest. Hence, when in 1868 the lands were sold at the instance of the first annuitant, his arrears paid off, and his term brought to an end, the interest of the second annuitant was still unbarred, and he was entitled to be paid out of the surplus proceeds of sale.

As to proof of the creation of a prior life estate, see *Earl of Miltown* v. *Goodman* (1876), Ir. R. 10 C. L. 27.

(2) *Previous Possession by Remainderman.*

The rule governing future estates applies notwithstanding previous possession by the remainderman :—

R. P. L. A., 1874, s. 2, clause 1. Effect of previous possession.

> "A right to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion or remainder, or other future estate or interest, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land or rent, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in the possession or receipt of the profits of such land, or in receipt of such rent."

Possession prior to the settlement does not prejudice remainderman under settlement.

This provision replaces sect. 5 of the Act of 1833. The only variations consist in the addition of the words "or suit" after "action," which is now of no effect, and of the words "or other future estate or interest" after "remainder." The latter change brings the clause into harmony with clause 4 of sect. 3 of the Act of 1833, which it is meant to explain ; but, in fact, the clause seems to be unnecessary. If A., who is seised in fee, conveys to B. for life, reversion to himself in fee, and B. enters under the life estate and remains in possession till his death, a right of entry will thereupon accrue to A. in respect of his reversion, and

if a stranger enters, the statute will run against A. The fact that A. was formerly in possession in respect of an estate prior to the settlement is irrelevant. It can hardly have been supposed that on the conveyance by A. to B. there was a discontinuance of possession by A. within the meaning of clause 1 of sect. 3 of the Act of 1833, so as to make the statute run against him, though it has been suggested that the provision was introduced to exclude such a possibility: Hayes' Conveyancing, vol. I. p. 255. The discontinuance of possession referred to in sect. 3 is a discontinuance which gives rise to a right of entry. Moreover, sect. 3, clause 1, applies only where the claimant has been in possession in respect of the estate or interest claimed, and has been dispossessed or has discontinued possession. But in the above case A., who claims in respect of his reversion, cannot be said to have been in possession in respect of that estate when at the time of possession he was seised in fee. He could not, prior to the creation of B.'s life estate, be in possession in respect of a reversion which did not then exist: see Lord St. Leonards' Real Prop. Stats. p. 51; *James* v. *Salter* (1837), 3 Bing. N. C. p. 554. The re-enactment of sect. 5 of the Act of 1833 in sect. 2 of the Act of 1874 has only perpetuated speculation as to the nature of the difficulty which the sections were intended to meet: see Smith's L. C., 9th ed. II. 748.

(3) *Owner of Particular Estate out of Possession.*

The period of limitation as against a remainderman is liable to be reduced to six years if the owner of the particular estate was out of possession:—

R. P. *L. A.*, 1874, s. 2, clause 2. Owner of particular estate out of possession.

"But if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action or suit shall be brought, by any person becoming entitled in possession to a future estate or interest, but within twelve years next after the time when the right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those two periods shall be the longer."

Thus where the owner of the preceding particular estate has been out of possession, the remainderman has the longer of two alternative periods, either twelve years from the time of the accrual of a right of entry or of action to the owner of the particular estate, or six years from the time when his own estate becomes vested in possession: see *Re Earl of Devon's Settled Estate*, [1896] 2 Ch. 562. But the clause does not operate when the owner of the particular estate is out of possession in consequence of having made a grant of the land in fee. The possession of the grantee is rightful to the extent of the particular estate, and the grantor is not "the person last entitled": *Pedder* v. *Hunt* (1887), 18 Q. B. D. 565, C. A.

(4) *Settlement while Statute is running.*

Settlement by owner out of possession.

An owner entitled in possession, against whom the statute is already running, cannot by settling the land postpone the operation of the statute as to persons taking future interests under the settlement. They claim through the settlor, and when his original right is barred they are barred also: *Stackpoole* v. *Stackpoole* (1843), 4 Dr. & War. p. 347; *Doe* v. *Moore* (1846), 9 Q. B. 555. The bar arises either under sect. 3, clause 1, or if that enactment is inapplicable because the settlor was not in possession "in respect of the estate or interest claimed" by the beneficiary under the settlement, then under the general provision of sect. 1 of the Act of 1874. It is for the adverse possessor to prove that his possession commenced before the settlement: *Cole* v. *Heydon* (1860), 1 L. T. 439.

Resettlement by remainderman.

Under the Act of 1833 it was not clear that a remainderman could not create a settlement while the statute was running against the owner of the particular estate, so as to give further time to ultimate remaindermen under the settlement. But in *Doe* v. *Edmonds* (1840), 6 M. & W. 295, it was held that claimants under such a resettlement were allowed only the time which the remainderman himself would have had, and the Act of 1874 contains a provision to this effect:—

R. P. L. A., 1874, s. 2, clause 3. Settlement by remainderman while statute running.

> "And if the right of any such person to make such entry or distress, or to bring any such action or suit, shall have been barred under this Act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will, or settlement, executed or taking effect after the time when a right to make an entry

or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the owner of the particular estate whose interest shall have so determined as aforesaid, shall make any such entry or distress, or bring any such action or suit, to recover such land or rent."

(5) *Forfeiture.*

Forfeiture.

Where an estate has been, or is liable to be, determined by forfeiture or breach of condition, the statute *primâ facie* runs from the date of the forfeiture or breach; but if advantage is not taken of the forfeiture or breach it does not run till the estate in remainder falls into possession in the ordinary course. This is provided as follows:—

R. P. L. A., 1833, s. 3, clause 5. Forfeiture or breach of condition.

"When the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken.

S. 4. Omission to enter for forfeiture.

"Provided always, that when any right to make an entry or distress or to bring an action to recover any land or rent, by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened."

Astley v. *Earl of Essex.*

In *Astley* v. *Earl of Essex* (1874), 18 Eq. 290, an estate had been devised in strict settlement, subject to a name and arms clause, and, in the event of any person who should become entitled neglecting for twelve months to comply with this clause, the estate was to go to the next remainderman then in being, as if the person so neglecting were dead. A tenant in tail under the will entered in 1832, but did not comply with the clause. He remained in possession until his death without issue in 1868. Jessel, M.R., held that the words "forfeiture or breach of condition," in sect. 4, were to be taken in their largest sense, so as to apply equally whether the effect was to give the grantor a right of re-entry under the old rules of the common law, or, as in the present case, to accelerate a

subsequent estate under a conditional limitation. Hence the remainderman, who had neglected to take advantage of the forfeiture, nevertheless retained his right to recover the land on the natural termination of the previous estate by the death of the tenant in tail.

If the condition upon which an estate is to determine requires an act to be done by the remainderman, his right of action does not arise until the act is done. By the will of a testator who died in 1863, land was devised to his widow for life and then to his son in fee. If the widow married again she was to lose all claim to the property on receiving £50. She remarried in 1874. The son died in 1897, and in 1898 tender of the £50 was made by the person who was heir-at-law of both the testator and his son. The right of action accrued at this last date: *Connolly* v. *Leahy*, [1899] 2 I. R. 344.

(6) *Effect of Extinction of Previous Estate.*

Possible acceleration of remainders by extinction of particular estate.

Where the previous particular estate is extinguished by the operation of the statute, the question arises whether the remainder is thereby accelerated so that a right of entry accrues to the remainderman, and the statute runs against him. Under sect. 3, clause 4, of the Act of 1833, the right is deemed to have accrued when the remainder "became an estate or interest in possession"; and sect. 2, clause 1, of the Act of 1874 adds the words, "by the determination of any estate or estates in respect of which such land shall have been held." The effect of adverse possession is not to transfer the particular estate, but to destroy it, so that there is a "determination" of the estate. But it does not necessarily follow that, because the particular estate is determined, the succeeding estate is thereby brought into possession. In favour of this result there is the analogy of the forfeiture of a life estate which gives a right of entry to the remainderman: Challis on Real Property, 2nd ed. p. 125; and the view has been maintained that the remainders are accelerated by the statutory extinction of the particular estate, and that on such extinction the statute commences to run against the remainderman: see Hayes' Conveyancing, vol. I. p. 269; 11 Jur. N. S. Part II. p. 181; and letter in 34 Sol. Journ. p. 691. But it seems more correct to say that the bar to the particular estate does not immediately affect the remainders.

The possessor who has ousted the tenant for life takes a possessory estate *pur autre vie*, and the remainderman, on the death of the *cestui que vie*, the *quondam* tenant for life, is entitled to the six years specially provided by the R. P. L. A., 1874, s. 2, clause 2, for the case of a tenant for life being out of possession.

(7) *Successive Estates in Same Person.*

Successive estates barred at same time.

Of the successive estates into which the fee is divided, more than one may belong to the same person, and the owner of the particular estate, against whom time is running, may thus be the owner also of a future estate; where, for example, there is a life estate in A., who has been dispossessed, remainder to B. for life, remainder to A. in fee. In such a case sect. 20 of the Act of 1833 provides that a bar to the first estate of A. is a bar also to his subsequent estate, unless in the meantime possession of the land has been recovered in respect of B.'s intermediate estate:—

R. P. L. A., 1833, s. 20. Present and future estates in same person.

> "When the right of any person to make an entry or distress or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall, at any time during the said period, have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, or any person claiming though him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest, or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession."

Doe v. *Moulsdale*.

An instance of the application of the section occurred in *Doe* v. *Moulsdale* (1847), 16 M. & W. 689. A term was created in 1784 for the lives of three persons, the last of whom died in 1835. Under various conveyances, devises, and descents, Lewis Jones in 1812 became entitled to the term as heir-at-law of his grandmother, Ann Jones, and to the reversion in fee as heir-at-law of his uncle, Richard Jones; but the widow of the previous owner of the term remained in possession till her death in 1843.

In 1846 ejectment was brought by Mrs. Hall, who claimed the fee as heiress to her brother Lewis Jones, who had died in 1834. There was a question whether the term had not merged in the fee upon the union of the two interests in Lewis in 1812, and then the statute would clearly have been a bar. Assuming, however, that there was no merger, the title of Lewis Jones to the term was barred in twenty years from 1812—that is, in 1832; and although, had the reversion been his only estate, time would not have commenced to run against him under sect. 3, clause 4, until it fell into possession in 1835, yet the co-existence in him of the title to the term and the title to the fee brought in the express provision of sect. 20. Consequently, his title to the term having been barred, the title of his successor to the fee was barred also.

Earlier estate must give right to possession.

But, in order that sect. 20 may operate, the earlier estate must have conferred upon its owner a right to possession of the land. In *Ludbrook* v. *Ludbrook*, [1901] 2 K. B. 96, C. A., A., who was a beneficiary under the will of a mortgagor, but who was not, under the trusts of the will, absolutely entitled to possession, paid off the mortgage and took a conveyance of the mortgaged premises. There was a possession adverse to the mortgagor's successors in title from 1885 to 1899, but the mortgage was kept alive by payment of interest. It was contended that, since the adverse possession barred A.'s beneficial interest, it barred also, under sect. 20, his title as mortgagee. Inasmuch, however, as A.'s title as beneficiary did not enable him to make an entry or distress, or bring an action to recover the land within the words of the section, his earlier estate did not come within its operation, and consequently his title as mortgagee was not barred.

Estates of appointees.

The section applies not only to future estates marked out by a definite course of limitation, but to any "estate, interest, right, or possibility, in reversion, remainder, or otherwise," to which the owner of a previous estate against whom the statute has run was entitled. These words, however, are used in their technical sense—"right," for instance, applies to an estate turned to a right of entry—and they do not include a general power of appointment. This is not technically an interest, right, or possibility. Hence a bar to the estate of the appointor is not a bar also to the estate taken under the appointment: *Re Earl of Devon's Settled Estate*, [1896] 2 Ch. 562.

In *Clarke* v. *Clarke* (1868), Ir. R. 2 C. L. 395, lands were devised to A., with limitation over to B., in case A. "took up with" a Roman Catholic, or died without a lawful heir. Both events happened, the former on 15th March, 1847; the latter on 6th January, 1867. B. claimed the lands in an action commenced on 1st June, 1867, but it was held that since his right under the first event was barred, his right under the second event was, by sect. 20, barred also. This, however, is opposed to *Astley* v. *Earl of Essex* (1874), 18 Eq. 290. The conditional limitation was within sect. 4 of the R. P. L. A., 1833, *supra* p. 57, and B. was not bound to take advantage of the forfeiture in 1847.

Successive rights of entry. *Clarke* v. *Clarke*.

Sect. 20 is subject to the proviso that it shall not operate if the land has been recovered in respect of an intermediate estate or interest. For the proviso to take effect it is not necessary that there shall have been an actual recovery by entry or action. It is sufficient that possession has been in fact held under such estate. In *Doe* v. *Liversedge* (1843), 11 M. & W. 517, the facts in which have been already shortly stated (*supra*, p. 52), the assignee in bankruptcy of the husband had vested in him the husband's life estate and remainder in fee; but the continuance in possession by the wife in respect of her intermediate life estate was a "recovery" of the land which saved the remainder in fee, assuming the husband's life estate to have been barred by the statute.

Recovery of the land in respect of intermediate interest.

(8) *Estates Tail.*

In the case of estates tail, the effect of the statute has to be considered as regards the issue in tail and the remainders expectant on the estate tail. The issue "claim through" the tenant in tail within the meaning of sect. 1 of the Act of 1833, and consequently, under sect. 1 of the Act of 1874, when the statute is running against the tenant in tail, it is running against the issue also. If, however, the tenant in tail is prevented by statute from doing any act whereby he can affect the interest of his heirs in tail, it is not competent for him to do this by neglect, and hence, in the event of his being out of possession, the statute will not run against them: *Earl of Abergavenny* v. *Brace* (1872), L. R. 7 Ex. 145. If he parts with the right to possession during his life, by an assurance which does

Issue in tail.

not affect the issue in tail, their estate becomes an independent future estate, and the statute does not run against them until this estate falls into possession: *Cannon* v. *Rimington* (1852), 12 C. B. 1; and see cases *infra*, p. 64.

Remainders on estate tail.

The operation of the statute as regards remainders expectant on the estate tail is defined by sects. 21 and 22 of the Act of 1833. Sect. 21 enacts that when the statute has run against a tenant in tail, it is to be taken to have run also against any estate, interest, or right which he might lawfully have barred, and sect. 22 provides that this result shall not be prevented by the death of the tenant in tail before the bar of the statute is complete; but that, if time has commenced to run against him, it shall continue to run against claimants to any estate, interest, or right which he might have barred:—

R. P. L. A., 1833, s. 21. Statute running against tenant in tail.

> "When the right of a tenant in tail of any land or rent to make an entry or distress or to bring an action to recover the same shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred.

S. 22. Death of tenant in tail while out of possession.

> "When a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore limited, which shall be applicable in such case, for making an entry or distress or bringing an action to recover such land or rent, no person claiming any estate, interest, or right which such tenant in tail might lawfully have barred shall make an entry or distress or bring an action to recover such land or rent but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action."

These sections are wide enough to bar both the issue in tail and subsequent remaindermen; and it was formerly thought that they applied to both these classes: *Rimington* v. *Cannon* (1853), 12 C. B. 18, p. 34; *Austin* v. *Llewellyn* (1853), 9 Ex. 276. But, as just stated, the case of the issue is already provided for, and sects. 21 and 22 apply only to estates in reversion or remainder subsequent to the estate tail: *Earl of Abergavenny* v. *Brace* (1872), L. R. 7 Ex. 145. The effect of the sections is to place the remaindermen, like the issue, in the position of

claimants under the tenant in tail: *Goodall* v. *Skerratt* (1854), 3 Drew. 216. In other words, the whole series of limitations forms, for the purpose of the statute, one unbroken estate, and when the statute runs against the tenant in tail, it runs equally against the issue in tail, as persons claiming through him, and against the remaindermen, as persons claiming estates which he might have barred.

Base fee.

There remains the case where the tenant in tail has created a base fee—that is, where he has executed a conveyance which bars the issue, but does not bar the remainders. The statute comes to the help of such defective assurance, and sect. 6 of the Act of 1874 (which replaces sect. 23 of the Act of 1833) provides that time shall run against the remainders and in favour of the person entitled under the assurance, from the date when the assurance, if then executed by the tenant in tail, would have been effectual to bar the remainders without the consent of any other person :—

R. P. L. A., 1874, s. 6. Defective assurance by tenant in tail.

> "When a tenant in tail of any land or rent shall have made an assurance thereof which shall not operate to bar the estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person or any other person whosoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail) shall continue or be in such possession or receipt for the period of twelve years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then, at the expiration of such period of twelve years, such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail."

Sect. 6 applies only when issue are barred.

A conveyance by a tenant in tail may be defective both as against the issue in tail and the remaindermen, or as against the remaindermen only. The former case happens when the formal requirements of a disentailing deed have not been complied with, or where the deed has not been enrolled; the

latter when the consent of the protector of the settlement is necessary and has not been given. Since in both cases the assurance is ineffectual against the remaindermen, and since this is the circumstance on which the application of the section ostensibly depends, it was at one time thought that the section might cure a defective assurance of either kind. It was held, however, in *Penny* v. *Allen* (1857), 7 D. M. & G. 409, where a recovery suffered in 1828 was bad as against the issue in tail for want of a good tenant to the *præcipe*, that sect. 23 applied only where the assurance was effectual as against the issue, and not against the remaindermen. Hence the statute did not run against the heir in tail till his title fell into possession in 1837, and his bill, filed in 1855, was in time. "The object of the 23rd section," said Lord Cranworth, "was to give effect to acts of a tenant in tail against remaindermen and reversioners, and to give effect to assurances, which, although they were effectual to bar the issue, were ineffectual to bar those entitled in remainder."

Penny v. *Allen.*

Morgan v. *Morgan.*

This view of the section is illustrated by *Morgan* v. *Morgan*, (1870), 10 Eq. 99. Land was settled on A. for life, remainder to B. in tail. In 1820 B. purported to convey the reversion in fee to X., but he did not bar the estate tail. B. died in 1824, and the estate tail devolved on his son C. On the death of A. in 1840, X. entered into possession, and in 1847 C. joined in a conveyance by X. to a purchaser, Y. This conveyance also was not executed as a disentailing assurance. C. died in 1860, and his son, D, on whom the estate tail descended, attained twenty-one in 1867, and filed his bill against X. and persons claiming under him in 1868. It was said that he was barred by the statute, but since neither of the conveyances of 1820 and 1847 was effectual against the issue, sect. 23 did not apply. Hence, in spite of the conveyance of 1820, C.'s right to possession accrued on the death of the tenant for life in 1840, and, on the principle already stated (*supra*, p. 62), his conveyance of 1847 turned D.'s estate into a future estate, against which time did not run till it fell into possession in 1860. D., therefore, was not barred.

Effect where estate tail barred by fine.

Sect. 23 of the Act of 1833 was applicable only to the modern method of barring estates tail, under which a tenant in tail, while his estate is in remainder, can by deed enrolled bar the issue in tail, but cannot, save with the consent of the protector of the settlement, bar the remainders. This

construction follows from the circumstance that the statute only runs in favour of the defective assurance as soon as that assurance would have been effectual without the consent of any other person—that is, of the protector. In *Anderson* v. *Anderson* (1861), 30 Beav. 209, a fine levied by tenant in tail in remainder was effectual to bar the issue in tail, but not the remainders; and this result was due, not to any want of consent, but to the fact that a fine was not a species of conveyance by which remainders could in any event be barred. There was no time, therefore, at which such an assurance, if then executed, would, without the consent of any other person, bar the remainders, and sect. 23 was of no assistance. This decision is equally applicable to sect. 6 of the Act of 1874.

Tenant in tail with preceding life interest.

It may happen that the tenant in tail in remainder has also a prior life interest, and then the possession of a purchaser from him may be referred to such life interest, so that he will not gain the benefit of sect. 6. This was the case in *Mills* v. *Capel* (1870), 20 Eq. 692, where F. had a life tenancy in remainder, and also an estate tail. In 1835, while both estates were still in remainder, F., by deed enrolled, made a conveyance in fee to a purchaser. A subsequent tenant for life, E., joined in the conveyance, but no consent was given by T., the tenant for life in possession. T. died in 1848, F. died without issue in 1859, and E. died in 1873. The land was then claimed by the remainderman subsequent to F.'s estate tail, and he succeeded. Had sect. 23 applied, time would have run in favour of the purchaser from 1848, when T., the first tenant for life, died; but it was held that the possession of the purchaser prior to 1873 was to be referred to the life interests of F. and E., and the statute did not assist him while those lives were in being.

Mills v. *Capel.*

Remainderman cannot stop statute running.

It is to be noticed that in cases where sect. 6 applies the remainderman may be, and usually is, powerless to do anything to stop the operation of the statute. Upon the death of the protector of the settlement the statute begins to run, but the remainderman can only enter and stop its operation in the event of the death of the tenant in tail and failure of his issue.

(9) *Proceeds of Waste.*

Claim of remainderman for

The proceeds of waste committed by a tenant for life by cutting timber have sometimes been treated as part of the settled

waste is barred in six years.

land, so that the remainderman has been allowed the statutory period for the recovery of land reckoned from the death of the tenant for life: *Duke of Leeds* v. *Earl of Amherst* (1846), 2 Ph. 117; *Harcourt* v. *White* (1860), 28 Beav. 303. But this is erroneous: *Morris* v. *Morris* (1858), 6 W. R. 427. The claim is not a claim to land, but is either a mere money demand or a claim in trover, according as the timber has been sold (*Gent* v. *Harrison* (1859), Johns. 517), or not (*Whitfield* v. *Bewit* (1724), 2 P. Wms. 240); and it is barred under the Limitation Act, 1623 (*infra*, p. 192), in six years from the date when the right of action accrues (*Seagram* v. *Knight* (1867), 2 Ch. 632; *Higginbotham* v. *Hawkins* (1872), 7 Ch. 676). This date depends on the circumstances under which the waste is committed.

Legal waste. (i.) Proceeds belong to first vested estate of inheritance.

The proceeds of legal waste belong to the owner of the first vested estate of inheritance (*Udal* v. *Udal* (1649), Aleyn, 81), even though there is an intermediate tenant for life who is not impeachable for waste: *Lewis Bowles' Case* (1616), 11 Rep. 97 b; *Pigot* v. *Bullock* (1792), 1 Ves. Jun. 479; *Gent* v. *Harrison* (*supra*). And contingent interests are excluded from taking (*Garth* v. *Cotton* (1750), 2 Wh. & T. L. C. 7th ed. 970; *Carendish* v. *Mundy* (1877), W. N. p. 198), notwithstanding a contrary opinion expressed by Lord Romilly, M.R., in *Bagot* v. *Bagot* (1863), 32 Beav. p. 523; unless the tenant for life is in collusion with the remainderman (*Garth* v. *Cotton*), or is himself the owner of the first vested estate of inheritance (*Williams* v. *Duke of Bolton* (1784), 3 P. Wms. 268; *Powlett* v. *Duchess of Bolton* (1797), 3 Ves. 374), provided, in the latter case, that, under the circumstances, he is really to be regarded as colluding with himself as remainderman: *Birch-Wolfe* v. *Birch* (1870), 9 Eq. 683. Waste committed by an equitable tenant for life is of the nature of legal waste, since the form of the limitations does not affect the rights *inter se* of the persons equitably entitled: *Simpson* v. *Simpson* (1879), 3 L. R. Ir. p. 316.

(ii.) Proceeds into settlement.

Where, however, the cutting of the timber is rightful, as where it has been cut by order of the Court; or where it has been cut by the direction of the trustees—but not of the tenant for life himself, *Seagram* v. *Knight* (*supra*); and the cutting is for the benefit of the estate, and such that the Court would sanction it; the proceeds are treated as part of the estate and follow the uses of the settlement, though if there is a tenant for life in remainder not impeachable for waste, he becomes absolutely entitled upon

his estate falling into possession: *Waldo* v. *Waldo* (1841), 12 Sim. 107; *Phillips* v. *Barlow* (1844), 14 Sim. 263; *Gent* v. *Harrison* (*supra*); *Lowndes* v. *Norton*, 6 C. D. 139. And the same rule is adopted where equity interposes on the ground that there has been collusion: *Powlett* v. *Duchess of Bolton* (1797), 3 Ves. 374. The wrongful cutting is regarded as a wrong to the settlement, and the property wrongfully taken from the settlement must be restored to it.

Equitable waste.

In the case of equitable waste—that is, the cutting of ornamental timber by a tenant for life who is not impeachable for waste—equity follows the law, and the proceeds go to the owner of the first vested estate of inheritance: *Rolt* v. *Somerville* (1737), 2 Eq. Cas. Abr. 759; *Marquis of Ormonde* v. *Kynnersley* (1829), 7 L. J. Ch. (O.S.) 150; *Simpson* v. *Simpson* (1879), 3 L. R. Ir. 308; though in *Honeywood* v. *Honeywood* (1874), 18 Eq. 306, Jessel, M.R., held that in such a case the proceeds would go into the settlement: see *Duke of Leeds* v. *Earl of Amherst* (1846), 2 Ph. 117.

Date from which time runs.

Such being the destination of the proceeds of waste, the date of the accrual of the right to recover the proceeds is determined accordingly. In legal waste wrongfully committed, where there is no collusion between the tenant for life and the remainderman, since the owner of the first vested estate of inheritance is immediately entitled, time runs against him at once, and he is barred in six years under the Limitation Act, 1623, unless the time is extended by reason of disability: *Seagram* v. *Knight* (*supra*); *Higginbotham* v. *Hawkins* (*supra*). But where the proceeds of sale should go into the settlement, either because the cutting is rightful, or on the ground of collusion, time does not run till the death of the tenant for life. Upon that event happening time runs against the succeeding owner, whether entitled for life or for any other interest, and he is barred in six years. Moreover, inasmuch as such succeeding owner claims on behalf of all the owners successively entitled, all are barred together: *Birch-Wolfe* v. *Birch* (1870), 9 Eq. 683.

Section V.—Trustee and Cestui que Trust.

Division of subject.

Where the ownership of land is divided between persons who take rights differing in their nature, the question of the operation of the statute arises as between such persons *inter se*, and as between them and strangers. For the case of division of ownership into legal and beneficial estates, we have to consider its operation (1) in favour of the trustee against the *cestui que trust;* (2) in favour of the *cestui que trust* against the trustee; (3) in favour of a stranger as against the trustee or the *cestui que trust*, or both; and (4) in favour of one *cestui que trust* against the rest.

(1) *In Favour of the Trustee against the Cestui que Trust.*

The following provisions are material as regards claims against a trustee:—

R. P. L. A., 1833, s. 24. Limitation on suits in equity.

"No person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity.

S. 25. Saving for express trusts.

"Provided always that when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him."

Judicature Act, 1873, s. 25 (2).

"No claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations."

Law before 1833.

Previously to the Act of 1833 it was settled that, when a trustee was in possession, his possession was to be regarded as

the possession of the *cestui que trust*, and the length of time during which the trustee omitted to discharge the trust was no bar to the *cestui que trust's* claim against him: *Chalmer* v. *Bradley* (1819), 1 Jac. & W. p. 67. "If," said Lord Redesdale in *Hovenden* v. *Lord Annesley* (1806), 2 Sch. & Lef. p. 633, "a trustee is in possession and does not execute his trust, the possession of the trustee is the possession of the *cestui que trust*; and if the only circumstance is that he does not perform his trust, his possession operates nothing as a bar, because his possession is according to his title." But a distinction was made between express trusts, declared by the parties, and constructive trusts, arising from circumstances or from the acts of the parties; and claims in respect of trusts of the latter kind were liable to be barred: *Townsend* v. *Townsend* (1783), 1 Bro. C. C. p. 554; *Beckford* v. *Wade* (1805), 17 Ves. p. 95.

Present law.

Under sect. 24 of the R. P. L. A., 1833, all claims in equity are liable to be barred, and the claim of a *cestui que trust* against his trustee would fall within that section, but for the saving of sect. 25, which, as well as the more general provision of the Judicature Act, 1873, s. 25 (2), preserves the distinction between express and constructive trusts. "The statute," said Wigram, V.-C., in *Att.-Gen.* v. *Flint* (1844), 4 Hare, p. 155, "first provides for cases of dry legal rights; and then the 24th section, as I understand it, takes up the case of those equitable rights which are distinguishable from the equitable rights of *cestui que trusts* under express trusts." And the effect of sect. 25 was stated by Lord St. Leonards in *Law* v. *Bagwell* (1843), 4 Dr. & War. p. 408, as follows: "The 25th section of the late Statute of Limitations, providing for express trusts, renders lapse of time unimportant in all cases within the section—that is, between the *cestui que trust* and his trustee—until the trust is disturbed, and that disturbance can only be effected by such a denial of the trust as takes place when the trustee sells to a third party for valuable consideration the property so held by him in trust: *cf. Magdalen College* v. *Att.-Gen.* (1857), 6 H. L. C. p. 215.

Statute does not run while the land is held by trustee;

So long, therefore, as the land is retained by the trustee, time does not run at all against the *cestui que trust*, and such a case does not fall within sect. 8 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), which allows the Statute of Limitations, under certain circumstances, to be pleaded by a trustee (*infra*, p. 280). That section, so far as it relates to the recovery of the land

or person taking from him otherwise than for value.

itself, does not apply while the land remains in the possession of the trustee. Moreover, the rights of the *cestui que trust* are not prejudiced by the possession of persons claiming under the trustee otherwise than for valuable consideration. "A trustee, remaining in possession, never acquires possession adverse, within the meaning of the Act, to his *cestui que trust*; and if he convey to any one not for value, the same result follows": *per* Lord St. Leonards in *Burroughs* v. *M'Creight* (1844), 1 Jo. & Lat. p. 304. Thus the trustee in bankruptcy of the *cestui que trust* under a will, taking a conveyance of the legal estate from the trustee of the will, holds it upon the subsisting trusts, and if the *cestui que trust's* interest is still liable to be treated as assets in a previous bankruptcy, it is held for the previous trustee in bankruptcy: *Sturgis* v. *Morse* (1858), 3 De G. & J. 1. And an heir of a surviving trustee takes, of course, subject to the trust: *Smith* v. *Smith* (1876), 1 L. R. Ir. 206; *cf. Att.-Gen.* v. *Davis* (1870), 18 W. R. 1132.

Conveyance to purchaser for value.

But upon conveyance to a purchaser for valuable consideration the statute forthwith begins to run (*Law* v. *Bagwell* (1843), 4 Dr. & War. p. 408), notwithstanding that the purchaser has notice of the trust: *Magdalen College* v. *Att.-Gen.* (1857), 6 H. L. C. 189. A lessee is entitled to the benefit of the statute, since a lease is an alienation *pro tanto*: *Att.-Gen.* v. *Payne* (1859), 27 Beav. 168; *Att.-Gen.* v. *Davey* (1859), 4 De G. & J. 136. And valuable consideration includes the consideration of marriage. Hence, if the trustee settles the trust property upon the occasion of marriage, the statute runs in favour of the persons entitled under the settlement (*Petre* v. *Petre* (1852), 1 Drew. pp. 387, 397), including the persons entitled to an ultimate remainder in fee limited by the settlement to the settlor himself: S. C.; though this latter point cannot be taken to be settled: *Smith* v. *Smith* (1876), Ir. R. 10 Eq. p. 281; see 1 L. R. Ir. 206, C. A.

Bar extends to future equitable interests.

Sect. 25 enacts generally that upon a conveyance for value "the right of the *cestui que trust*" shall be deemed to accrue, and there is no provision, as under sect. 3, for the case of future interests. Hence it would seem that twelve years is a bar to all persons entitled under the trust, as well in remainder as in possession, with an extension of time, however, in the event of the *cestui que trust* in possession being under disability: *Magdalen College* v. *Att.-Gen.* (1857), 6 H. L. C. p. 215. The

allowance for disability simply extends the time within which a *cestui que trust* whose right of action has accrued may bring the action; it does not affect the time of accrual of the right. It was suggested by Lord St. Leonards in *Thompson* v. *Simpson* (1841), 1 Dr. & War. p. 489, that, as against future equitable interests, the statute would not run until they fell into possession. But in that case the trustee who conveyed had himself a beneficial life interest, to which during his life the possession of the purchaser could be referred, and under such circumstances the statute would not run against the remainderman until the death of the trustee tenant for life. For an ordinary case of a conveyance by a trustee the rule as stated appears to be correct. The words of sect. 25 require that the date of the conveyance to the purchaser shall fix the time of accrual of the right of action in respect of the equitable interest as against every person falling under the description of *cestui que trust*.

(i.) *Express Trusts.*

How an express trust is constituted.

To constitute an express trust there must be a trust "expressly declared by a deed, or a will, or some other written instrument": *per* Kindersley, V.C., in *Petre* v. *Petre* (1852), 1 Drew. p. 393. As to lands, writing is required by sect. 7 of the Statute of Frauds; but as to personalty (other than leaseholds), the trust can be declared by parol: *Harris* v. *Truman* (1881), 7 Q. B. D. p. 357; *Sands* to *Thompson* (1883), 22 C. D. 614. So in *Cunningham* v. *Foot* (1878), 3 App. Cas. p. 984, Lord Cairns, C., said that by an express trust he understood the Legislature to mean "a trust which arises upon the construction of the written instrument, not upon any inference of law imposing a trust upon the conscience; a trust arising upon the words of the instrument itself": *cf.* *Dickinson* v. *Teasdale* (1862), 1 D. J. & S. p. 59; *Sands to Thompson* (*supra*).

It is not essential, however, that the trust should be declared in plain and unambiguous terms. The use of the word "trust" is not necessary: *Commissioners of Donations* v. *Wybrants* (1845), 2 Jo. & Lat. p. 189; and the trust is none the less express because it has to be made out from all the terms of the instrument: see *per* Rigby, L.J., in *Re Williams*, [1897] 2 Ch. 12, at p. 27. Thus, where the various elements of the trust—the property subject to it, the persons to be benefited,

and the interests they are to take—are clearly ascertained (*Malim* v. *Keighley* (1791), 2 Ves. p. 335; *Knight* v. *Knight* (1840), 3 Beav. p. 173), an express trust may be created by any words which indicate an intention that the person to whom the property is given shall be bound by a trust; see *Pushman* v. *Filliter* (1795), 3 Ves. 7. But the Courts are less ready than formerly to construe words of recommendation as creating a "precatory trust": *Lambe* v. *Eyans* (1871), 6 Ch. p. 599; and even the words "in full confidence" do not necessarily have that effect: *Re Adams* and *The Kensington Vestry* (1884), 27 C. D. 394, C. A.; *Re Williams* (*supra*); *cf. Re Hanbury*, [1904] 1 Ch. 415, C. A.; *H. L. sub nom. Coniskey* v. *Bowring Hanbury*, [1905] A. C. 84; *Re Diggles* (1888), 39 C. D. 253, C. A.; *Re Hamilton* [1895], 2 Ch. 370. Moreover it must be possible for the relation of *trustee and cestui que trust* to be established. A testator cannot, on a devise of land in tail, make the devisee trustee for the remainderman after the estate tail, so as to prevent him from barring the entail: *Dawkins* v. *Penrhyn* (1878), 4 App. Cas. 51. As to persons who are treated by courts of equity as express trustees, though not strictly such, see *infra*, p. 274.

Mortgage by way of trust for sale.

Where a mortgage is created in the form of a trust for sale, the relation of the parties, so far as concerns the land, is solely that of mortgagor and mortgagee, and there is no express trust to exclude the statute: *Kirkwood* v. *Thompson* (1865), 2 H. & M. p. 402. Hence the mortgagee can gain a title against the mortgagor by twelve years' possession: *Locking* v. *Parker* (1872), 8 Ch. 30; *Chapman* v. *Corpe* (1879), 27 W. R. 781. And where the mortgagor has thus lost his equity of redemption, his rights do not revive if, upon a subsequent sale, the mortgagee professes to sell under his trust for sale as mortgagee and not as owner: *Re Alison* (1879), 11 C. D. 284, C. A.; see *Warner* v. *Jacob* (1882), 20 C. D. 220.

(ii.) *Constructive and Resulting Trusts.*

Statute runs against constructive trusts.

Distinguished from express trusts are trusts which arise by operation of law, and which again may be divided into constructive and resulting trusts. Sometimes implied trusts are spoken of as a separate class (see Trustee Act, 1893, s. 50), but for the present purpose this is unnecessary: see *Cook* v. *Fountain* (1672), 3 Swanst. App. 585; *Portlock* v. *Gardner* (1842), 1 Hare, p. 607. Subject to the distinction as to resulting trusts

mentioned subsequently, the statute in such cases can be set up by the trustee. "If," said Kindersley, V.C., in *Petre* v. *Petre* (1852), 1 Drew. p. 393, "a person has been in possession, not being a trustee under an instrument, but still being in under such circumstances that the Court, on the principles of equity, would hold him a trustee, then the 25th section of the statute does not apply; and if the possession of such a constructive trustee has continued for more than twenty years, he may set up the statute against the party who, but for the lapse of time, would be the right owner."

Cases of constructive trusts.

It has been held, accordingly, that the statute is not excluded in the following cases:—Where a tenant for life of leasehold property obtains a renewal of the lease to himself: *Petre* v. *Petre* (*supra*); *Re Dane's Estate* (1871), Ir. R. 5 Eq. 498; where money is secured by a vendor's lien: *Toft* v. *Stephenson* (1848), 7 Hare, 1, decided when charges on land were saved by express trusts; where the trust depends on questions of fact and law, and evidence has been lost: *Malone* v. *O'Connor* (1859), 9 Ir. Ch. R. 459; and where the husband of a legatee took from the executor, in satisfaction of the legacy, an assignment of leaseholds alleged greatly to exceed the legacy in value: *Pyrah* v. *Woodcock* (1871), 24 L. T. 407. Where a mortgage is given to secure an advance made by a trustee, the mortgagor is not an express trustee so as to prevent the statute from clearing the land of the mortgage: *Re Scott* (1858), 8 Ir. Ch. R. 316. A possession which is merely wrongful creates no trust at all, still less an express one; and a husband, who, being entitled to one moiety of an estate, enjoyed the other in right of his wife, and who held over after her death, gained thereby a title to such other moiety against the heir: *Ex parte Hasell* (1839), 3 Y. & C. Ex. 617.

Trustee *de son tort.*

A person who assumes to act in an express trust without being duly appointed trustee seems in strictness to be no more than constructively a trustee, and upon the mere language of sect. 25 he would be able to plead the statute; but it is settled that under such circumstances he cannot be allowed to say for his own benefit that he had no right to act as trustee, and he is estopped from taking advantage of the lapse of time, so long as he retains the property: *Life Association of Scotland* v. *Siddall* (1861), 3 D. F. & J. 58; *Quinton* v. *Frith* (1868), Ir. R. 2 Eq. p. 416; *Lyell* v. *Kennedy* (1889), 14 App. Cas. p. 459; *Soar* v.

Ashwell, [1893] 2 Q. B. 390, C. A.; and see cases on receipt of property by persons in a fiduciary position, *infra*, p. 274.

Resulting trusts.

With respect to resulting trusts a distinction has to be made. Where the resulting trust arises solely by operation of law, as where upon a purchase of land a trust results in favour of the person who pays the purchase-money, the conveyance being taken to another, clearly there is no express trust. The term "resulting trust," however, is also used where the trust itself, the separation of the beneficial from the legal ownership, has been created by a written instrument, but through failure in the objects of the trust the beneficial interest results to an heir or other person ascertained by rules of law. In such a case the law points out the beneficial owner, but it does not create the trust, and the trust is still regarded as express. Thus in *Salter* v. *Cavanagh* (1838), 1 Dr. & Wal. 668, lands were devised in trust to pay certain annuities which did not exhaust the profits. It was held that the devisee was intended upon the will to be a trustee as to the whole, and hence he was an express trustee for the heir-at-law, in whose favour there was a resulting trust of the surplus: *cf. Nugent* v. *Nugent* (1884), 15 L. R. Ir. 321. Similarly in *Patrick* v. *Simpson* (1889), 24 Q. B. D. 128, where real estate was devised to trustees, but the objects of the trust were declared as to part X only and not as to part Y, it was held that the testator's widow, who was one of the trustees and also tenant for life of part X, and who entered on the whole, did not gain a title to part Y against the testator's heir-at-law. As to him she held upon an express trust.

But these cases only apply where a trust affecting the land is actually created by the will: see *Yardley* v. *Holland* (1875), 20 Eq. 428. An executor, although under the Executors Act, 1830 (11 Geo. 4, c. 40), he is a trustee for the next of kin of the residue not disposed of, is not an express trustee: *Re Lacy*, [1899] 2 Ch. 149; nor, it would seem, is he, by virtue of the similar enactment of sect. 2 (1) of the Land Transfer Act, 1897, an express trustee of real estate devolving upon him under the Act for the persons beneficially entitled thereto. And so, where a conveyance to trustees for a charity is void for non-compliance with the Mortmain Act (9 Geo. 2, c. 36; now the Mortmain and Charitable Uses Act, 1888, 51 & 52 Vict. c. 42), but the trustees have entered into possession, there is no instrument which raises an express trust in favour of the grantor, and

consequently the trustees can acquire a title against him under the statute: *Churcher* v. *Martin* (1889), 42 C. D. 312.

(iii.) *Charities.*

Charities. Previously to the Act of 1833 a charity was not barred "by length of time or any Statute of Limitations:" *Att.-Gen.* v. *Mayor of Coventry* (1700), 2 Vern. p. 399; *Magdalen College* v. *Att.-Gen.* (1857), 6 H. L. C. 189, p. 207; though length of time might be important in determining the effect and construction of an instrument (*Att.-Gen.* v. *Mayor of Bristol* (1820), 2 Jac. & W. p. 321), or in determining whether an existing state of circumstances should be interfered with: *Att.-Gen.* v. *Hungerford* (1834), 2 Cl. & Fin. p. 378. But the Act of 1833 has no saving in favour of charities, and they are barred like other equities unless preserved by an express trust: *Commissioners of Donations* v. *Wybrants* (1845), 2 Jo. & Lat. 182; *Magdalen College* v. *Att.-Gen.* (*supra*); *Magdalen Hospital* v. *Knotts* (1879), 4. App. Cas. 324. Nor is the statute excluded on the ground that the class for whose benefit the charity is established cannot themselves sue. By sect. 1 of the R. P. L. A., 1833, the word "person" is extended to "a class of creditors and other persons, as well as an individual," and an action by the Attorney-General in the name of the class is equivalent to an action by them: *Magdalen College* v. *Att.-Gen.* (*supra*); *Att.-Gen.* v. *Davey* (1859), 4 De G. & J. 136; *Att.-Gen.* v. *Payne* (1859), 27 Beav. 168. *Att.-Gen.* v. *Persse* (1842), 2 Dr. & War. 67, where it was held that time would not run against a rent-charge devised for payment of a schoolmaster's salary until a schoolmaster had been appointed, seems to be inconsistent with the *Magdalen College Case*. The schoolmaster was not the object of the charity, and proceedings to establish the charity could have been taken by the persons for whose benefit it was intended.

(2) *In favour of the Cestui que Trust against the Trustee.*

(i.) *Express Trusts.*

Former law. In general the *cestui que trust* under a simple trust (Lewin on Trusts, 11th ed. p. 847) is entitled to the actual possession of the trust estate, and the trustee is not allowed to deprive him of it: *Cholmondeley* v. *Clinton* (1817), 2 Mer. p. 359. And this possession is accounted for at law by describing the *cestui que*

trust as tenant at will to the trustee: *Freeman* v. *Barnes* (1671), 1 Ventr. 80; 1 Sider. 349, 458. The tenancy supports the seisin of the trustee (*Parker* v. *Carter* (1844), 4 Hare, 400), and it followed under the law prior to 1833 that the possession, while held under such tenancy, was not adverse to the trustee: *Keene* v. *Deardon* (1807), 8 East, 248; *Smith* v. *King* (1812), 16 East, 283. Nor did the assignee of an equitable tenant for life gain adverse possession as against the trustee till the death of the tenant for life: *Fausset* v. *Carpenter* (1831), 2 Dow & C. 232.

But the *cestui que trust* could prevent a tenancy, and exclude the seisin of the trustee, by repudiating the title of the latter from the beginning of his possession; and, though he originally took possession under the trustee, he might subsequently disseise him, and make time run in his own favour: *Cholmondeley* v. *Clinton* (1817), 2 Mer. p. 360. Disseisin was effected by any distinct claim to hold adversely to the trustee: *Earl of Pomfret* v. *Lord Windsor* (1752), 2 Ves. S. 472; *Faussett* v. *Carpenter* (1831), 2 Dow & C. p. 243; or it might, if the trustee had never been in possession, and if the *cestui que trust* had been in exclusive possession as owner, be presumed from lapse of time: *Earl of Portsmouth* v. *Lord Effingham* (1750), 1 Ves. S. p. 435.

Present law.

Under the present law the *cestui que trust* in occupation is still regarded as tenant at will to the trustee: *Garrard* v. *Tuck* (1849), 8 C. B. 231; and while the tenancy lasts, the possession of the *cestui que trust* is the possession of the trustee, and time does not run against the latter: *Melling* v. *Leak* (1855), 16 C. B. p. 669. Under sect. 7 of the Act of 1833, a tenancy at will is deemed to determine, at latest, at the end of the first year, so that the landlord, if he does not re-enter or create a fresh tenancy, is barred in thirteen years: *infra*, p. 97. But the section is subject to the following proviso:—

Cestui que trust in occupation.

R. P. L. A., 1833. Proviso to sect. 7.

> "Provided always, that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee."

Consequently, where a *cestui que trust* is holding under the trustee, the statute only runs where there has been an actual determination of the tenancy. Cases of such actual determination do not often arise. Apparently, the matter is governed by the ordinary rules as to the determination of tenancies at will: *Doe* v. *Phillips* (1847), 10 Q. B. 130; *Melling* v. *Leak* (*supra*); but, at any

rate, any act on the part of the *cestui que trust* will be sufficient which would have amounted to a disseisin under the old law. And where the legal estate is outstanding in a bare trustee and the beneficiary is in possession, there is not even a tenancy at will, and the legal estate will be vested in the beneficiary in twelve years: *Re Cussons, Ltd.* (1904), 73 L. J. Ch. 296. The above statement assumes that the *cestui que trust* on entering recognizes the title of the trustee. If he enters without such recognition, no tenancy at will is created; his possession is not the possession of the trustee, and the statute runs against the latter: *Burroughs* v. *M'Creight* (1844), 1 Jo. & Lat. 290; *Bolling* v. *Hobday* (1882), 31 W. R. 9.

Cestui que trust in receipt of rents.

The tenancy at will only arises where the *cestui que trust* is in occupation. If he does not go into occupation, but merely receives the rents, at the same time recognizing the title of the trustees, he receives them as agent for the trustees, and there is no tenancy at will between him and the trustees which will prevent the statute running in favour of the occupier. Hence an occupier, who has been let into possession by the *cestui que trust* as tenant at will or yearly tenant, can, by non-payment of rent, gain a title against the trustee: *Melling* v. *Leak* (1855), 16 C. B. p. 669.

(ii.) *Constructive Trusts.*

Constructive trusts.

The proviso to sect. 7 should apparently be restricted to express trusts: *Doe* v. *Rock* (1842), Car. & M. 549; *cf. Beckford* v. *Wade* (1805), 17 Ves. 87; *Sands* to *Thompson* (1883), 22 C. D. 614. It thus corresponds with sect. 25 of the same Act, and the possession of a *cestui que trust* under a constructive trust is left to the ordinary provisions of the statute. The trustee's right of entry accrues at the end of the first year of the *cestui que trust's* occupation, and in twelve years from that time the trustee's title is extinguished without the *cestui que trust* doing anything adverse to it. In ordinary cases this is probably convenient. There is no reason for prolonging the trust, and in a comparatively short time the *cestui que trust's* interest is clothed with a legal title, and the trust is put an end to. But in the case of a *cestui que trust* with a limited interest, it has been supposed that the result would be to vest the legal fee in him, discharged from the equities of persons entitled in remainder,

and to avoid this the proviso to sect. 7 was, in *Drummond* v. *Sant* (1871), L. R. 6 Q. B. 763, extended to constructive trusts.

Drummond v. *Sant.*

In that case A., for more than twenty years prior to 1867, was in possession of land which had been reclaimed from the Thames. Under the circumstances of the case, and by virtue of the statute authorizing the reclamation, the legal fee of the land was in B., and A. was entitled under an agreement for a lease for ninety-nine years from 1768. It was argued that B. and A. stood in the relation of trustee and *cestui que trust;* that A., on entering, became tenant at will to B.; and that, under sect. 7, he had gained a title against B., unless the proviso applied. It was held that the proviso did apply upon the ground that it applied to "actual direct" trusts, and that the trust here was of this nature. Apparently, any constructive trust clearly established would be an "actual direct" trust within the meaning of the decision, and the effect, if the decision is really to be referred to this ground, is to make the proviso to sect. 7 apply alike to express and constructive trusts.

Limited estate under constructive trust.

There are, however, two ways of dealing with such cases which make this extension of the proviso unnecessary. Under the above circumstances B. had no right to possession of the land during the ninety-nine years, and if he had attempted to re-enter he would have been restrained in equity from interfering with the possession of A., the *cestui que trust,* until this term had expired. It follows that after the expiration of the term, the *cestui que trust* and his successors in title would be restrained from setting up the statute in any action to recover possession brought by the trustee or his successors in title. Formerly this required separate proceedings in equity in aid of the ejectment: see *Scott* v. *Scott* (1854), 4 H. L. C. 1065; and the judgment of Maziere Brady, L.C., 11 Ir. Eq. R. p. 509, in the same case: "I think if this bill had been filed to aid this ejectment, the defendant would have been restrained from relying on that bar"; and see 38 Solicitors' Journal, p. 612. But under the present practice no separate proceedings are necessary. In the action brought to recover the land on the termination of the *cestui que trust's* estate he can be prevented from setting up the statute.

But the simpler and more satisfactory way is to treat the constructive trustee as having, during the continuance of the

cestui que trust's limited estate, no right of entry at all, so that the statute does not commence to run against him. This course, which was adopted in *Warren* v. *Murray*, [1894] 2 Q. B. 648, C. A., explains the result in *Drummond* v. *Sant*, and leaves the proviso to sect. 7 applicable only to express trusts. Moreover, the suggestion made in *Drummond* v. *Sant* that the destruction of the trustee's estate would carry with it the destruction of the future equitable estates, was, according to the present doctrine of the relation of legal and equitable estates, groundless. The future equitable estates would still be capable of enforcement when they fell into possession: *infra*, p. 80.

(3) *In favour of a Stranger.*

(i.) Disseisin of trustee.

A stranger in possession of land may either hold adversely to the trustee, or, admitting the trustee's title, may claim to hold under him as *cestui que trust*. Previously to 1833 it was settled that, where he held adversely to the trustee, the statute ran in his favour as against the trustee and also the *cestui que trust*. "A *cestui que trust*," said Lord Redesdale, in *Hovenden* v. *Annesley* (1806), 2 Sch. & Lef. p. 629, "is always barred by length of time operating against the trustee. If the trustee does not enter and the *cestui qui trust* does not compel him to enter, as to the person claiming paramount the *cestui que trust* is barred." "If," said Plumer, M.R., in *Widdowson* v. *Earl of Harrington* (1820), 1 Jac. & W. p. 566, "the bar attaches on the legal title, it attaches also on the equitable title": *cf. Lewellin* v. *Mackworth* (1740), 2 Eq. Cas. Abr. 579; *Pentland* v. *Stokes* (1812), 2 B. & B. p. 75; Preston on Abstracts, II. 378. This followed from the conception of a trust as a matter operating only on the conscience of the trustee.

Whether bar to trustee is a bar to all equitable interests.

Until recently it has been generally assumed that the R. P. L. A., 1833, did not affect this principle, and, if the title of the *cestui que trust* is still treated as being entirely dependent on that of the trustee, the fact that, under sect. 34, the trustee's title is extinguished furnishes strong reason for saying that the *cestui que trust* loses his interest by the operation of the statute against the trustee. If this is so, it also follows that the *cestui que trust* can have no allowance on the ground of disability: *cf. Wych* v. *East India Co.* (1734), 3 P. Wms. 309;

nor, if his estate is future, is the operation of the statute postponed till it falls into possession. Accordingly opinions have been expressed that both these results follow: *Re Scott* (1858), 8 Ir. Ch. p. 323 (as to disabilities), and *Cooper* v. *Warre* (1865), 18 Ir. Jur. 24 (as to remainders); see Lewin on Trusts, 11th ed., pp. 8–10, 271, 1087. In *Quinton* v. *Frith* (1868), Ir. R. 2 Eq. p. 416, the question how far a possession adverse to the trustee's title would affect the *cestui que trust* was treated as an open one. In *Stewart* v. *Marquis of Conyngham* (1849), 1 Ir. Ch. R. 534, it was considered that it would at any rate bar executory trusts.

Re Nisbet & Pott's Contract.

On the other hand, in *Scott* v. *Scott* (1854), 4 H. L. C. 1065, Lord Cranworth, C., suggested that a legal estate got by disseisin would not affect the rights of parties equitably entitled, and this suggestion has recently been embodied in an authoritative decision in *Re Nisbet & Pott's Contract*, [1906] 1 Ch. 386, C. A. It follows from that case that equitable interests rank as independent estates in the land, and continue to be enforceable against the legal owner of the land for the time being, whether he has acquired it by assignment or by disseisin, unless, in the former case, he can claim to be a purchaser for value without notice—a claim which of course cannot be made by a disseisor. The actual point in *Re Nisbet & Pott's Contract* related to restrictive covenants. It was decided that these created in favour of the covenantee an interest in the land which was independent of the estate of the covenantor, and that they were binding upon the land in the hands of an adverse possessor who had gained a legal title in consequence of the lapse of the statutory period and the extinction of the title of the covenantor. But the interest in land created by a restrictive covenant is at most equitable, and the same considerations apply with greater force to trusts which confer upon the *cestui que trust* a direct interest in the land itself.

Bar to the trustee not now a bar to all beneficiaries.

The reason for saving restrictive covenants from sharing in the extinction of the covenantor's estate was based by Collins, M.R., on the language of sect. 34. The statute does not begin to run against a person until that person has been put to what is generally called his "right of entry"; and then, after the statutory period, the right and title of such person are extinguished. In the case of a restrictive covenant, the extinction of the title of the covenantor, does not affect the covenantee, who is not put upon the assertion of his right unless and until that right has

been interfered with in some way. Similarly, it would seem, in the case of an equitable estate, the extinction of the trustee's title under sect. 34 is confined in its effect to that title. The interest of the *cestui que trust* is an independent interest, and the operation of the statute against this interest is quite separate from its operation against the estate of the trustee. The statute does not run against the *cestui que trust's* interest until the *cestui que trust* has a present right to assert it, and, moreover, the *cestui que trust* is entitled to any additional time allowed by the statute for disability.

Equitable interest not dependent on estate of trustee.

This view of the separate operation of the statute as regards the estate of the trustee and the estates of the *cestui que trusts* is supported by the consideration that in an action by the *cestui que trust* to recover the land, it is no longer necessary to join the trustee: *Antrim, etc., Co.* v. *Stewart*, [1904] 2 I. R. 357, C. A. The rule to the contrary laid down in *Allen* v. *Wood* (1893), 68 L. T. 143, C. A., applies only to the case of an executory trust, and then the alleged trustee must be before the Court in order that the trust may be established against him. The non-dependence of equitable interests upon the estate of the trustee, and the possibility that they may exist when the trustee's estate has been destroyed, involves a considerable breach with the old law, and it has not passed without criticism: see Mr. T. Cyprian Williams' articles in 51 Solicitors' Journal, pp. 141, 155; but it is not likely to be overruled. It is probable, however, that the principle only applies where the *cestui que trusts* have equitable interests in the land itself. Where they are only entitled to share in the proceeds of sale of the land, the extinction of the trustee's title extinguishes the trust for sale: *Bolling* v. *Hobday* (1882), 31 W. R. 9 (*infra*, p. 83); and then, apparently, the *cestui que trusts* cease to have any claim against the land. In the case already noticed (*supra*, p. 77), where a person, who has been let into possession by the *cestui que trust* acting as agent for the trustees, gains a title against the trustees, he would gain a title also against such *cestui que trust*, though not, if the above view is correct, against *cestui que trusts* in remainder.

(ii.) Possession adverse only to *cestui que trust.*

But the possessor may recognize the legal title of the trustee, and may claim to hold adversely to the *cestui que trust* alone. This was the case which was considered at great length in *Cholmondeley* v. *Clinton* (1820), 2 Jac. & W. 1; the difficulty

being caused by the doubt whether, under the old law, equity could recognize the bar of the statute when there had been no disseisin. It was held that it could, and that an equitable owner's title could be barred notwithstanding that the legal estate was outstanding. Under the present law no such question can arise. In whatever proceedings the true *cestui que trust* seeks to enforce his claim to possession against the *de facto cestui que trust*, this claim is an equitable claim, which is not saved as against the *de facto cestui que trust* by sect. 25 of the Act of 1833, this enactment only referring to suits against the express trustee and persons claiming through him. It is accordingly barred in the same manner as if it were a legal claim.

Receipt of rents from trustee is not equivalent to adverse possession.

But this assumes that the stranger is in possession of the land or in immediate receipt of the rents and profits. He is in the position of owner, although he claims only under an equitable title. He makes a wrongful claim to be *cestui que trust*, and as such is let into possession. If he merely receives the rents and profits from the trustee, the result is different. The trustee is in possession and he holds for the person really entitled. In *Lister* v. *Pickford* (1865), 13 W. R. 827, trustees, who were in the receipt of rents, paid them to A. instead of to B. who was the actual *cestui que trust*. More than twenty years elapsed before the mistake was discovered, but Romilly, M.R., held that B.'s right was not barred. The trustees were in possession for the actual *cestui que trust*, and their mistake as to who the actual *cestui que trust* was did not affect his rights.

(4) *In favour of one Cestui que Trust against the Rest.*

Possession of one *cestui que trust* adverse to trustee.

The case where one of several *cestui que trusts* has been in possession of more than his share of the trust estate depends upon principles which have been considered under the previous heads. Under the old law possession gained adversely to the trustee, and held long enough to bar the trustee's estate, was a bar at the same time to the equities of the other *cestui que trusts:* see *Harmood* v. *Oglander* (1803), 8 Ves. p. 131. At present the result is the same, provided that the *cestui qui trusts* who are excluded have present interests and are under no disability. Thus, in *Burroughs* v. *M'Creight*,

(1844), 1 Jo. & Lat. 290, lands were conveyed to a trustee and his heirs in trust for five persons as tenants in common in fee. For more than twenty years four of the five *cestui que trusts* were in the exclusive enjoyment of the rents and profits, and the trustee never acted in the trust. The fifth *cestui que trust* was held to be barred. The other four, said Lord St. Leonards, were not persons who had placed themselves in the shoes of the trustees, but persons who, in spite of the trustees, had continued to receive the whole of the rents of the estate for their own exclusive benefit. In *Bolling* v. *Hobday* (1882), 31 W. R. 9, real estate was devised in trust for A. for life, and then on trust for sale and division of the proceeds between B., C., D., and E. equally. After the death of A., the possession was held by D. and E., and after E.'s death by D. for more than twenty years, to the exclusion of B. and C. This was held to extinguish the title of the trustees and also of B. and C. In a case similar to *Burroughs* v. *M'Creight* the statute would now be treated as running independently as against the trustees and as against the *cestui que trusts*, so that the latter would be entitled to claim allowance for disability, if any, and, if their estates were future, the statute would not run till they fell into possession: *supra*, p. 81. But under the circumstances in *Bolling* v. *Hobday* the *cestui que trusts* had no direct interest in the land, but only in the performance of the trust for sale, and the ground upon which the case was decided, namely, that, since the trustee's estate was gone, the trust was gone also, seems to be still correct. "By the extinguishment of the legal estate, the trusts by which that estate was affected were also extinguished": *per* Chitty, J. (31 W. R. p. 11).

Possession under trustee adverse to other *cestui que trusts*.

Where one *cestui que trust*, while recognizing the title of the trustee, is in actual possession of the whole or of more than his share of the land, time will run in his favour against the rest, so that he will gain a title to the whole, or so much as he possesses. For this purpose he is in the position of a stranger. An opposite opinion seems to have been expressed by Turner, L.J., in *Knight* v. *Bowyer* (1858), 2 De G. & J. p. 441, but there the trustees were in receipt of the rents, and the case falls within the principle of *Lister* v. *Pickford* (1865), 13 W. R. 827, namely, that the trustee, when in possession, holds on behalf of the persons rightfully entitled, notwithstanding the lapse of time. When one *cestui que trust* is actually in possession, or in receipt

of rents and profits, an action against him does not fall within sect. 25, which excepts actions "against the trustee or any person claiming through him" from the general bar of sect. 24 against equitable claims. But where the lands are leasehold, and there are from time to time surrenders of the leases and fresh grants to the trustees, this may have the effect of preventing the *cestui que trusts* of part from gaining a title by possession to more than their share of the land: see *East Stonehouse Urban Council* v. *Willoughby Brothers*, [1902] 2 K. B. 318 (*infra*; p. 111).

Section VI.—Mortgagor and Mortgagee.

Where land is subject to a mortgage, the statute may operate (1) in favour of the mortgagor against the mortgagee; (2) in favour of the mortgagee against the mortgagor; and (3) in favour of a stranger, whether against the mortgagor only, or against both the mortgagor and the mortgagee. Division of subject.

(1) *In Favour of the Mortgagor.*

It is sometimes said that the mortgagor in possession is tenant at will to the mortgagee, but the expression must be taken with caution: *Keech* v. *Hall* (1778), 1 Doug. 21; *Moss* v. *Gallimore* (1779), 1 Doug. 279. In particular there is no such tenancy as to deprive the mortgagee of his immediate right to possession: *Birch* v. *Wright* (1786), 1 T. R. p. 383. Perhaps the mortgagor more resembles a tenant at sufferance: *Doe* v. *Maisey* (1828), 8 B. & C. 767; *Pope* v. *Biggs* (1829), 9 B. & C. 245; but no legal relation, it has been observed, affords a complete analogy: *Cholmondeley* v. *Clinton* (1820), 2 Jac. & W. p. 183; *cf. Doe* v. *Barton* (1840), 11 A. & E. p. 314; *Sands* to *Thompson* (1883), 22 C. D. 614. Relation of mortgagor to mortgagee.

A mortgagee's right of entry is kept alive during the twelve years following any payment under the mortgage by virtue of the R. P. L. A., 1837 (1 Vict. c. 28). Mortgagee's right of entry.

> "It shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the [R. P. L. A., 1833], to make an entry or bring an action at law or suit in equity to recover such land at any time within twelve years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twelve years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity, shall have first accrued, anything in the said Act notwithstanding. R. P. L. A., 1837, as altered by R. P. L. A., 1874, s. 9. Time runs from last payment of principal or interest.

In the R. P. L. A., 1833, no special provision was made for the case of a mortgagor in possession; and since the mortgagee has a right of entry, possibly on the execution of the mortgage,

and in any case, on default in payment of the principal at the specified day, it was considered that, under the general rule of the statute, time would, at one of such dates, run against him, notwithstanding that interest on the mortgage debt was being regularly paid: *Doe* v. *Williams* (1836), 5 A. & E. 291; *cf. Doe* v. *Lightfoot* (1841), 8 M. & W. 553. Hence, by the above section, as altered by sect. 9 of the R. P. L. A., 1874, it was provided that any person entitled to or claiming under any mortgage of land might recover the land within twelve years next after the last payment of any part of the principal money or interest, although more than the statutory period had elapsed since the first accrual of the right of entry or action: see *Heath* v. *Pugh* (1881), 6 Q. B. D. p. 362. The effect is that the statute commences to run upon default in payment at the day fixed for redemption, but it may be continually stopped by payment of interest.

Second mortgage.

Where there are two mortgages and no payment is made in respect of the second mortgage, the statute runs against the second mortgagee, notwithstanding the fact that the legal estate is outstanding in the first mortgagee: *Kibble* v. *Fairthorne*, [1895] 1 Ch. 219; and it has been held that it is the same even though the first mortgagee is in possession: *Samuel Johnson and Sons (Ltd.)* v. *Brock*, [1907] 2 Ch. 533. But this seems to be incorrect. Upon the first mortgagee taking possession the second mortgagee ceases to have a right of entry, and his interest becomes, for the purpose of the statute, a future interest: *Re Bermingham's Estate* (1870), 5 Ir. R. Eq. 147; *cf.* R. P. L. A., 1833, s. 42, as to arrears of interest in such a case, *infra*, p. 179.

Effect of payment.

Upon the payment being made the statute immediately begins to run afresh; and since the mortgagee's title is extinguished at the end of twelve years, a payment after this period does not help him, even though made in pursuance of an order obtained in a foreclosure action: *Hemming* v. *Blanton* (1873), 42 L. J. C. P. 158. Where the mortgagor has assigned the equity of redemption, payment can be effectually made either by the assignee: *Forsyth* v. *Bristowe* (1853), 8 Ex. 716; or by the mortgagor: *Chinnery* v. *Evans* (1864), 11 H. L. C. 115; and generally as to the effect of payment, see *infra*, Chap. VII.

Union of characters of mortgagor and mortgagee.

If the same person temporarily unites the characters of mortgagor and mortgagee, he is considered as applying the rents and profits in keeping down the interest, and accordingly,

where a tenant of life of land is entitled to a charge upon it, the statute does not run against the charge during his life: *Burrell* v. *Earl of Egremont* (1844), 7 Beav. 205, 237. And if the tenant for life is beneficially entitled to receive interest, and is liable to have the interest deducted from income, it makes no difference that the land and the charge are vested in different sets of trustees: *Topham* v. *Booth* (1887), 35 C. D. 607. The same principle applies where a married woman is entitled to the interest for her separate use, and her husband is liable to pay it, and the two have a common purse: *Re Hawes* (1892), 62 L. J. Ch. 463. And it applies generally where the title to an existing fund is in question: *Mills* v. *Borthwick* (1865), 35 L. J. Ch. 31; but not where the interest would arise from a fund not in existence, though covenanted to be brought into existence: *Spickernell* v. *Hotham* (1854), Kay, p. 676. And the statute does not run where the mortgagee is tenant in common of the equity of redemption, for a tenant in common is entitled to receive the whole rents subject to accounting to his co-tenant: *Wynne* v. *Styan* (1847), 2 Ph. 303.

Mortgage of future interest.

Where the property subject to the mortgage is reversionary, time does not run against the mortgagee until it falls into possession. He has, indeed, a present right to bring a foreclosure action, and so to obtain a transfer to himself of the reversionary beneficial interest of the mortgagor: *Sinclair* v. *Jackson* (1853), 17 Beav. p. 410. Hence it might be supposed that as between himself and the mortgagor the statute would, in the absence of payment of interest, run forthwith. But foreclosure is treated, for the purpose of the statute, as a mode of recovering possession of land, and in this view it is not effective so long as the mortgaged interest is future. The mortgagee, therefore, can bring foreclosure within twelve years of the interest falling into possession, although his personal remedy for the debt may then be barred: *Hugill* v. *Wilkinson* (1888), 38 C. D. 480; *Re Conlan* (1892), 29 L. R. Ir. 199.

Foreclosure creates a new title.

Heath v. *Pugh*.

If, during the currency of the statute, the mortgagee brings foreclosure and obtains an order absolute, since the effect of the order is to vest in him a new title as owner, he can assert this title at any time within twelve years from the date of the order. In *Heath* v. *Pugh* (1881), 6 Q. B. D. 345, C. A.; 7 App. Cas. 235, a legal mortgage of land had been made to the plaintiffs in 1856. In 1859 the equity of redemption was conveyed by the

mortgagor, Stephen, to the defendant. In 1870 the plaintiffs filed a bill against Stephen and the defendant for redemption or foreclosure, and an order for foreclosure absolute was made in 1877. There was no proof of payment at any time on account of principal or interest, nor of any acknowledgment in writing of the plaintiffs' title. Lord Selborne, C., in delivering the judgment of the Court of Appeal, pointed out that, on the principle of *Casborne* v. *Scarfe* (1737), 1 Atk. 603, the mortgagor is, while he remains in possession, substantially the owner of the land, and the mortgagee a mere incumbrancer; and the effect of the foreclosure is to vest in the person who was previously an incumbrancer the ownership of, and beneficial title to, the land. "It follows," he said, "from this state of the law, that when the owner of land under an ordinary decree of foreclosure absolute takes proceedings to recover possession of that land, he seeks possession of that which, by a title newly accrued, has for the first time become his own property; and that it can make no difference whether the title which he previously had as a mere incumbrancer was, or was not, protected by the legal estate. The possession which he now claims, and the right by virtue of which he seeks to recover it, are substantially different from the possession which he might before have claimed, and from the right by virtue of which he might have claimed it." Technically, Lord Selborne brought the case within the statute by holding that the foreclosure amounted to a forfeiture of the mortgagor's equitable estate—an estate which, since the Judicature Acts, at any rate, must be recognized in a Court of Law—and that the mortgagee's right of action accrued, under the last clause of sect. 3 of the Act of 1833, at the date of such forfeiture.

In the House of Lords (7 App. Cas. 235) Lord Cairns thought it unnecessary to bring the case under any of the clauses of sect. 3. The action was not by the mortgagee as such to gain possession under his legal title, but by one who had become absolute owner under a decree of the Court, and his right to bring it accrued, within the meaning of sect. 2 of the Act of 1833, at the date of the decree, sect. 3 not being exhaustive as to all the cases to which sect. 2 was to apply. Thus, before foreclosure, the mortgagee, whether legal or equitable, is merely an incumbrancer. By the order for foreclosure he for the first time gains a title as owner, and against this title the statute

only then begins to run: see *Thornton* v. *France*, [1897] 2 Q. B. 143, C. A.

If the mortgage is paid off, but no re-conveyance is taken, the mortgagee becomes constructively a trustee for the mortgagor: *Quarrell* v. *Beckford* (1816), 1 Madd. p. 278. The mortgagor accordingly is tenant at will, and, under sect. 7 of the R. P. L. A., 1833, he gains a legal title in thirteen years from the payment. The operation of that section is not excluded by the proviso, "that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee" (*supra*, p. 76), inasmuch as the proper relation of mortgagor and mortgagee is at an end, and the trust which succeeds to it is not express: *Sands* to *Thompson* (1883), 22 C. D. 614 (*supra*, p. 77). Where mortgage paid off.

(2) *In Favour of the Mortgagee.*

Under the old law, although the mortgagee was said to be for some purposes a trustee for the mortgagor, yet this was not so in reference to the statute, and if he went into possession, and held for more than twenty years without acknowledgment and without account, the mortgagor's equity of redemption was barred: *Dillon* v. *Parker* (1822), Jac. p. 513. So, under the present law, when a mortgagee has obtained possession of land, the mortgagor can only bring an action to redeem the mortgage within twelve years after the time at which the mortgagee obtained such possession, unless in the mean time an acknowledgment in writing of the mortgagor's title, signed by the mortgagee, has been given to the mortgagor or his agent:— Mortgagee in possession.

> "When a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within twelve years next after the time at which the mortgagee obtained such possession or receipt [*unless in the mean time an acknowledgment in writing of the mortgagor's title has been given*]." R. P. L.A., 1874, sect. 7. Mortgagor barred in twelve years.

This section replaces sect. 28 of the Act of 1833. As to acknowledgment, see *infra*, p. 323. The mortgagee's title under the statute, while inchoate, devolves as personalty: *Re Loveridge*, [1902] 2 Ch. 859.

Mortgagee must be in possession as mortgagee.

To gain the benefit of the section the mortgagee must enter and continue in possession solely as mortgagee. If he enters as purchaser of a life tenancy, or if, after entry, he purchases such tenancy, the statute will not, during the continuance of this interest, run against the remaindermen. This was the rule previous to the R. P. L. A., 1833: *Corbett* v. *Barker* (1795), 3 Anst. p. 759; *Raffety* v. *King* (1836), 1 Keen, 601; and is the rule under the R. P. L. Acts; *Hyde* v. *Dallaway* (1843), 2 Hare, 528: see *Booth* v. *Purser* (1838), 1 Ir. Eq. R. 33, 43; *contra*, *Browne* v. *Bishop of Cork* (1839), 1 Dr. & Wal. 700, where it was held that the rule was abolished, upon the ground that sect. 28 expressly barred the right of the mortgagor without regard to the nature of the mortgagee's possession. It is, however, in such a case the duty of the mortgagee, who unites the characters of tenant for life and mortgagee in possession, to keep down the interest of the mortgage for the benefit of the remaindermen: *Raffety* v. *King*, *supra*; and, since he is to be deemed to perform this duty, the statute does not run.

Bar extends to all persons interested in equity of redemption.

But when the mortgagee enters solely in that capacity, the statute runs at once in his favour as against all persons interested in the equity of redemption; and where an estate is limited, subject to a mortgage, to a tenant for life with remainders over, the remaindermen are barred by the lapse of twelve years equally with the tenant for life. This was the rule of the old law: *Harrison* v. *Hollins* (1812), 1 Sim. & St. 471; and it follows now from the express bar of sect. 7 of the Act of 1874 on "the mortgagor or any person claiming through him."

Mortgagor remaining in possession of part of property.

It was formerly the rule that if the mortgagor remained in possession of part of the mortgaged property, time would not run against him as to the other part: *Blake* v. *Foster* (1814), 2 B. & B. 565. But no such distinction is made in the R. P. L. Acts, and the bar of the statute now applies to any land of which the mortgagee has in fact taken possession: *Kinsman* v. *Rouse* (1881), 17 C. D. 104.

Welsh mortgage.

Sect. 7 of the R. P. L. A., 1874, does not apply to a Welsh mortgage; that is, to a mortgage under which the lender goes into possession and receives the rents and profits until he is satisfied or the borrower redeems: see Fisher on Mortgages, 5th ed., pp. 7, 673; Coote on Mortgages, 5th ed., p. 538; and as to such mortgages, see *Longuet* v. *Scawen* (1750), 1 Ves. S. p. 406; *Balfe* v. *Lord* (1842), 2 Dr. & War. p. 487;

Teulon v. *Curtis* (1832), Younge, 610. The mortgagor's right to redeem is not a mere equity, but springs out of the contract, and under the old law time did not run against it so long as anything was due on the mortgage: *Orde* v. *Heming* (1686), 2 Vern. 418, where redemption was allowed after sixty years; though after the debt had been satisfied, a lapse of twenty years barred the right to a re-conveyance: *Fenwick* v. *Reed* (1816), 1 Mer. p. 125. A Welsh mortgage being thus different from an ordinary mortgage as regards the relative rights of the parties, it is not possible to apply to it the provisions of sect. 7 and make time run against the mortgagor from the entry of the mortgagee. The mortgagor can at any time exercise the right of redemption given him by the contract: *cf.* *Alderson* v. *White* (1858), 2 De G. & J. p. 109; though the *dictum* of Lord Cranworth, reported as referring to a contract giving the mortgagor the right to redeem at any time, is in the report in 4 Jur. N. S. 125, referred to a contract for sale and repurchase. But the statute will run, as under the old law, when the debt is satisfied. The mortgagee is then trustee for the mortgagor, and, since the trust is only constructive, the mortgagee gains a title free from the mortgagor's right to redeem in twelve years.

As to absolute conveyances really given as security, see *Cotterell* v. *Purchase* (1735), Cas. t. Talb. 61; *Doyle* v. *Culverwell* (1862), 4 D. F. & J. 20. As to mortgages by way of trust for sale, *vid. sup.* p. 72.

(3) *In Favour of a Stranger.*

Possession adverse to mortgagor only.

A stranger who is in possession of land subject to a mortgage may claim to have gained a title either as against the mortgagor only—that is, a title to the equity of redemption—or as against both mortgagor and mortgagee. The former case was the subject of the celebrated decision under the old law in *Cholmondeley* v. *Clinton* (1820), 2 Jac. & W. 1, where it was settled that a stranger might gain a title to the equity of redemption by lapse of time. The same result follows under the present law, since the true owner's right in equity to possession of the land is liable to be barred under sect. 24 of the Act of 1833 exactly as though it were a legal right: *Fletcher* v. *Bird*, Fisher on Mortgages, 5th ed., p. 972.

Possession adverse to mortgagee also.

Where a stranger is in possession without recognition of the mortgage, time runs in his favour as against both mortgagor and mortgagee, but as against the latter the operation of the statute may be prevented by payment of principal or interest under the R. P. L. A., 1837 (*supra*, p. 85). A payment by the mortgagor is effectual for this purpose, notwithstanding that he is out of possession: *Doe* v. *Eyre* (1851), 17 Q. B. 366; *Ford* v. *Ager* (1863), 2 H. & C. 279; and see *Eyre* v. *Walsh* (1860), 10 Ir. C. L. R. 346; provided that the mortgage was created before the statute began to run against the mortgagor. An owner against whom the statute is already running cannot, by creating a mortgage, confer a fresh right on the mortgagee, and then keep such right alive by payment of interest: *Thornton* v. *France*, [1897] 2 Q. B. 143, C. A. *Doe* v. *Eyre* (*supra*), so far as it decides to the contrary, is overruled, though in that case the possession at the date of the mortgage was not adverse to the mortgagor. But, of course, if the running of the statute as against the mortgagor is stopped, this operates in favour also of the mortgagee.

Persons "claiming under" the mortgage.

And a payment is only effectual in favour of a "person entitled to or claiming under" the mortgage: R. P. L. A., 1837. Probably the mortgage should be existing when the claim is made; but whether this is necessary or no, a purchaser of the land, who takes a conveyance in which the mortgagee joins, or who subsequently pays off the mortgage, does not "claim under" the mortgage so as to get the benefit of the statute: *Thornton* v. *France*, [1897] 2 Q. B. 143, C. A., overruling on this point *Doe* v. *Massey* (1851), 17 Q. B. 373. If, however, the mortgage was made before the statute began to run against the mortgagor, and if the mortgage is still subsisting, a payment under the R. P. L. A., 1837, will keep alive the title of the mortgagee, although the mortgagor's title may have been extinguished: *Ludbrook* v. *Ludbrook*, [1901] 2 K. B. 96, C. A.

Section VII.—Lord and Copyholder.

In the same manner as under the last head the inquiry divides itself into three parts—the operation of the statute in favour respectively of the lord, the quasi-copyholder, and a stranger.

(1) *In Favour of the Lord.*

Seizure absolutely or *quousque.*

When a copyholder has died, and his heir, after proclamation duly made, does not come to be admitted, the lord may, by virtue of a special custom, seize the lands absolutely, and the interest of the heir is thereby forfeited; but in the absence of such custom he can only seize *quousque*—that is, till the heir comes to be admitted: *Doe* v. *Helier* (1789), 3 T. R. 162; *Doe* v. *Trueman* (1831), 1 B. & Ad. 736. When a seizure *quousque* has taken place, proceedings on the part of the heir to compel admittance fall within the phrase "action to recover land," and he is barred in twelve years from the seizure: *Walters* v. *Webb* (1870), L. R. 5 Ch. 531; see *R.* v. *Ingardsley* (1836), 5 Dowl. 19.

(2) *In Favour of Copyholder.*

Accrual of lord's right to seize.

By "copyholder" is here to be understood a person who, being entitled to admittance, holds possession without admittance. The question then arises whether, by the lord's omission to compel him to procure admittance, the tenure is changed to freehold, and the answer depends upon the date at which the statute begins to run against the lord's right to seize *quousque*. This is a right of entry within the meaning of sect. 1 of the R. P. L. A., 1874, but it is not possible to assign any certain date for its accrual from which time can be reckoned. If it were a case of forfeiture, time would run from the event giving rise to the right of forfeiture: *Doe* v. *Helier* (1789), 3 T. R. 172; *Whitton* v. *Peacock* (1834), 3 My. & K. p. 335. But the mere omission of the heir to come in is no cause of forfeiture. Before the lord has any right at all, express notice

must be given to the heir, or the homage must present the death of the ancestor, and there must be three proclamations at three successive courts for the heir to come in; *Doe* v. *Trueman* (1831), 1 B. & Ad. 736. It is only after this has been done that the lord can issue his precept to seize the land. Upon such notice being given or proclamations made, and the failure of the heir to comply, the lord's right of entry arises. But otherwise the right never comes into existence, and consequently the statute does not begin to run: *Ecclesiastical Commissioners* v. *Parr*, [1894] 2 Q. B. 420, C. A.; *Beighton* v. *Beighton* (1895), 43 W. R. 685; *cf. Turner* v. *West Bromwich Union* (1860), 9 W. R. 155. The result is that a copyholder cannot claim that the tenure has been changed to freehold by virtue of the statute unless he can show failure to comply with the notice or with the proclamations, and the subsequent lapse of the statutory period without seizure by the lord.

Presumption of enfranchisement.

But though it is in general impossible to show that the statute has run against the lord, the Court will presume an enfranchisement where there has been long possession without recognition of the lord's rights. And such presumption is made also against the Crown. In *Roe* v. *Ireland* (1809), 11 East, 280, land had been copyhold of a Crown manor till 1636, and a copyhold rent of 6*s.* 6*d.* had been paid. After that date no new tenant appeared upon the rolls, but an annual rent of 6*d.* was regularly paid. In the Parliamentary Survey of 1649 this was described as a freehold rent, and receipts given by the steward of the manor between 1803 and 1805 described it as a quit rent. The manor was in lease from before 1634 down to 1804. In 1806 and 1807 proclamations were made for tenants to come in and be admitted, and, none appearing, the lands were declared to be forfeited, and ejectment was brought to recover them. At the trial the jury were directed that there was no ground for presuming an enfranchisement, since it would be subversive of the maxim *nullum tempus occurrit regi;* but from this the King's Bench dissented, and a new trial was ordered, Lord Ellenborough, C.J., saying that he would presume anything capable of being presumed in order to support an enjoyment for so long a period. In *Re Lidiard and Jackson's and Broadley's Contract* (1889), 42 C. D. 254, copyholds had not been dealt with on the court rolls after 1779, and there was no evidence on the rolls of any proceedings for forfeiture or for recovery of heriots,

fines, or fees after that date. The last copyhold tenant died in 1819, and in all subsequent changes of title, which were numerous, the land was dealt with as freehold, except that in deeds of 1878 and 1883 there were recitals that it was copyhold. Kay, J., held that, apart from the recitals, enfranchisement should be presumed, and that the recitals must be taken to be erroneous. On the other hand, in *Turner* v. *West Bromwich Union* (1860), 9 W. R. 155, where from 1717 to 1859 the lord had been negligent in enforcing a payment of 10*s.* once in every seven years for which, so long as the land should be used as a workhouse, the fines and heriots had been commuted, but otherwise the possession had not been adverse to his rights, Wood, V.C., held that no enfranchisement was to be presumed.

Incidents of copyhold tenure.

Of the various incidents of copyhold tenure other than the lord's right to seize *quousque*, namely, fines, fealty and suit of court, heriots, reliefs, and rents, it would seem that it is only rents which are liable to be barred: *Howitt* v. *Earl of Harrington*, [1893] 2 Ch. 497. There is nothing in the R. P. L. Acts applying to fines, and the remaining incidents, though *primâ facie* they fall within the definition of "rent" in sect. 1 of the Act of 1833, are excepted on the ground that they fall due only at irregular intervals: *supra*, p. 24. But the right to recover any particular fine is liable to be barred in six years under the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42) s. 3, *infra*, p. 197.

(3) *In Favour of a Stranger.*

Waste of manor.

Where a stranger, whether a disseisor or a tenant at will of the lord, is in possession of part of the waste of the manor, so that the statute is running against the lord, the lord's title is extinguished at the end of the statutory period, and the land vests as freehold in the possessor: *Att.-Gen.* v. *Tomline* (1880), 15 C. D. 150.

Copyholds.

By sect. 1 of the R. P. L. A., 1833, "land" is defined to include land of copyhold tenure, and if a stranger enters on the land of a copyholder and holds it for the statutory period, the copyholder's title is extinguished, and the title to the land is vested in the possessor. Thereupon the steward would be bound to admit him. This follows from the clear recognition which has been accorded by the Courts to possessory titles: *cf.* *Re Hayden*, [1904] 1 I. R. 1 (*infra*, p. 117).

Section VIII.—Landlord and Tenant.

Division of subject.

Where land is let to a tenant, the statute may operate in favour of the landlord, of the tenant, or of a stranger. The first case seems to raise no question. If the tenant does not enter under the lease, time will run against him; and so, too, if the landlord enters wrongfully during the continuance of the lease. The cases to be considered are the second and third.

(1) *In Favour of the Tenant.*

Receipt of rent equivalent to receipt of profits.

The receipt of rent payable by a tenant is as against him the receipt of the profits of the land, and consequently such receipt prevents the statute from running against the landlord:

R. P. L. A., 1833, s. 35.

> "The receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this Act."

Previous law.

Under the old law a tenant could not, either during the continuance of the lease, or after its termination, gain a title against his landlord: *Saunders* v. *Annesley* (1804), 2 Sch. & Lef. p. 98; *Cholmondeley* v. *Clinton* (1821), 4 Bl. 96. If he repudiated his landlord's title during the lease, the landlord might, at his option, treat this as a forfeiture, but otherwise the lease was still subsisting; and if the tenant held over after the lease had expired, he was still tenant, although only tenant at sufferance, and his possession was not adverse.

The above section expressly preserves the title of the landlord so long as he is in receipt of rent, but it is doubtful whether it is required. The operation of the statute really depends on the consideration that during the continuance of the tenancy the landlord has no present right of entry. His interest, so far as actual occupation of the land is concerned, is future, and his right does not accrue, and the statute does not run, until his interest—that is, his reversion—falls into possession. But while this is the rule applicable to tenancies generally, special provision is made for tenancies at will and yearly tenancies.

(i.) *Tenancies at Will.*

In the case of a tenancy at will the landlord's right of entry accrues at latest at the end of the first year of the tenancy:—

R. P. L. A. 1833, s. 7. Right accrues at end of first year.

> "When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined" [*with a proviso excluding mortgagors and* cestui que trusts (*supra*, p. 76)].

Statute runs at latest from end of first year.

This section governs tenancies at will of land, and also, should such a case occur, of a rent-charge: *Doe* v. *Angell* (1846), 9 Q. B. p. 356 (*supra*, p. 23). The effect is that, if the tenancy is determined within a year of its commencement, and the tenant remains in possession without a renewal of the tenancy, time runs from such determination; if it is not determined within the year, time runs from the end of the year. Thus, if a person enters into possession of land as tenant at will, and nothing further is done, the landlord's title is extinguished in thirteen years: *Doe* v. *Turner* (1840), 7 M. & W. 226; *Doe* v. *Carter* (1847), 9 Q. B. 863.

This was doubted in *Randall* v. *Stevens* (1853), 2 E. & B. 641, by Lord Campbell, C.J., who found it difficult to admit that a tenancy at will was to be deemed in all cases to have determined at latest at the end of a year. He would have made that date the starting-point for the statute only when there was no actual determination subsequently within the statutory period. But the rule as above stated was adopted by the Privy Council in *Day* v. *Day* (1871), L. R. 3 P. C. 751.

Day v. *Day.*

In that case, A., the owner of land in fee, in May, 1842, let B. into possession, and B. remained in possession or in receipt of rent till his death in 1864. At various dates, commencing in or about 1852, and all within twenty-one years from May, 1842, B. let portions of the land to various persons, on yearly and weekly tenancies, and received rent from these under-tenants. He also transferred, or purported to transfer, his interest in part of the land to C. who likewise let it and received rent. A. had

notice of such lettings and transfer at the times at which they took place respectively. On B.'s death, the devisee for life under his will entered into receipt of the rents of the part of the land he had retained, until, in 1867, A. took possession and procured the tenants to attorn to him. The devisee brought ejectment. It was argued for A. that the letting of the land operated as a determination of the tenancy and fixed the time for the running of the statute, but it was held that such determination was only material if followed by resumption of possession or the creation of a fresh tenancy.

"The reasonable construction of this provision," it was said in the Privy Council, "is (according to Lord St. Leonards) that the right shall accrue ultimately at the end of a year from the commencement of the tenancy at will, though it may accrue sooner by the actual determination of the tenancy. In the present case the right under the statute must be deemed to have first accrued to [A.] in May, 1843, at which time the tenancy at will under which the occupation began, must for the purposes of the bar of the statute, be deemed to have determined. The condition of [B.] was, for these purposes, but that of a tenant at sufferance from and after May, 1843, unless and until a subsequent tenancy at will was created by a fresh agreement of the parties." And subsequently: "It seems to their Lordships that, as in this case the statute began to run from May, 1843, the question of a subsequent determination of the original tenancy is only relevant so far as it may have been preliminary to the creation of a fresh tenancy at will after the determination of the first and within the period of limitation. . . . When the statute has once begun to run it would seem on principle that it could not cease to run unless the real owner, whom the statute assumes to be dispossessed of the property, shall have been restored to the possession. He may be so restored either by entering on the actual possession of the property, or by receiving rent from the person in occupation, or by making a new lease to such person which is accepted by him; and it is not material whether it is a lease for a term of years, from year to year, or at will." The jury had found, however, that no new tenancy had been created. Consequently A. was barred and his title extinguished. The fee had become vested in B. and his devisee recovered.

Creation and Determination of Tenancy at Will.

Creation of tenancy at will.

A tenancy at will is created when lands or tenements are let by one man to another to be held at the will of the lessor: Litt. s. 68; and such a tenancy is usually implied from a simple permission to occupy: *Doe* v. *Wood* (1845), 14 M. & W. p. 687; or from an entry under a void lease: *Braythwayte* v. *Hitchcock* (1842), 10 M. & W. 494. The Courts lean, however, to yearly tenancies as giving more security to the tenant, and where there is a payment of rent referable to a year, or to the aliquot part of a year, the tenancy at will is converted into a yearly tenancy: *Richardson* v. *Langridge* (1811), 4 Taunt. 128; Tudor's L. C. in Real Prop. 4th ed. p. 4; 2 Sm. L. C. 11th ed. p. 134. The existence of a tenancy at will may be negatived by showing that the occupier has no exclusive possession on his own account. He may be servant or bailiff, or may be merely allowed on the premises as licensee, and in such characters he cannot gain a title under the statute: *supra*, p. 30. But a servant may be put in possession as tenant at will: *Hogan* v. *Hand* (1861), 14 Moo. P. C. 310. In *Mayor of Brighton* v. *Guardians of Brighton* (1880), 5 C. P. D. 368, the defendants, who had been allowed the use of certain buildings as offices by the predecessors in title of the plaintiffs, and who had had exclusive occupation, without payment of rent or acknowledgment of title, for above thirteen years, were held to be not mere licensees and to have gained a title under the statute.

Determination of tenancy at will.

The determination of the tenancy at will may be express, as where there is an actual demand of possession or other intimation that the tenant's occupation is to cease: Co. Litt. 55 b; *Doe* v. *Jones* (1830), 10 B. & C. 718; *Pollen* v. *Brewer* (1859), 7 C. B. N. S. 371; or implied, as where the lessor does any open act of ownership on the land which would not be lawful during a tenancy, and which would, therefore, on the assumption of the continuance of the tenancy, render the lessor liable to the lessee in trespass: *Turner* v. *Bennett* (1842), 9 M. & W. p. 646. It is determined also by the death of either party; by a conveyance of the reversion by the lessor, so soon as the tenant has notice (*Doe* v. *Thomas* (1851), 6 Ex. p. 857), although only by way of mortgage: *Jarman* v. *Hale*, [1899] 1 Q. B. 994; by an assignment of the premises by the lessee, so soon as the lessor has notice: *Pinhorn* v. *Souster*, 1853, 8 Ex. p. 772; *Melling* v. *Leak* (1855),

16 C. B. p. 669; and by any dealing with the land by the tenant inconsistent with his interest as tenant at will: Co. Litt. 57 a.

Lessor's right of entry.

But though the lessor has the right at any time to determine the tenancy at will and enter, he has not, until actual determination, such an immediate right of entry as will make the statute run against him during the first year: *Garrard* v. *Tuck* (1849), 8 C. B. 231. Nor does the grant of a lease by the lessor to a third person, though technically a determination of the tenancy at will, give the lessor such a right of entry as is contemplated by the statute: *Hogan* v. *Hand* (1861), 14 Moo. P. C. 310. During the first year of the tenancy, the possession of the tenant at will is not adverse to the lessor, and, if the latter grants a lease, the effect is to postpone his right of entry until the determination of the lease. His interest is turned into a future estate, and the statute does not run against him until it falls into possession. In *Hogan* v. *Hand* the lease was granted in 1832, and the possession of the tenant at will was then non-adverse under the old law. But if the lease is granted after the year, the statute is already running, and it cannot be postponed by the paper creation of a future estate. To avoid the statute the lessee must enter on the land.

Re-entry.

Statute stopped by re-entry.

The running of the statute may be checked by an effective entry; that is, by an entry which amounts to a resumption of possession by the landlord. In *Randall* v. *Stevens* (1853), 2 E. & B. 641, the plaintiff, who had been put into possession of a cottage by the overseers of a parish, occupied it without payment of rent from 1818 to 1839. In the latter year, just before the twenty-one years had elapsed, the overseers entered, turned out the plaintiff and his family, and removed nearly the whole of his furniture and goods. Shortly after, on the same day, he returned and held possession till 1852, when the overseers again entered, and, since he refused to give up possession, destroyed the cottage. It was held that in 1839 the overseers had resumed possession so that the statute ran afresh from the subsequent entry of the plaintiff, and they were not barred, therefore, in 1852. But where the owner of several adjacent houses allowed one to be occupied by a tenant at will for thirteen years, and, with the tenant's assent, entered from time to time

to do external repairs, similar to those he did to the other houses, it was held that he had not taken possession so as to stop the running of the statute: *Lynes* v. *Snaith*, [1899] 1 Q. B. 486. The occasional residence, however, of the owner with the tenant at will may save the statute: *Doe* v. *Groves* (1847), 10 Q. B. 486.

Creation of New Tenancy.

Statute stopped by creation of new tenancy.

The creation of a new tenancy at will also gives a fresh starting-point for the running of the statute. In *Turner* v. *Bennett* (1842), 9 M. & W. 643, Bennett had in 1817 let Turner into possession of land as tenant at will. In 1827 Bennett entered and quarried for stone, and thereby determined the tenancy, but did not retake possession. In 1829 Turner, as one of the assessors for land tax, signed an assessment in which he was named as the occupier of the land, and Bennett was named as the proprietor. It was held that this was evidence from which the jury might properly infer the creation of a new tenancy: see *Doe* v. *Turner* (1840), 7 M. & W. 226. In *Locke* v. *Matthews* (1863), 13 C. B. N. S. 753, A. in 1830 enclosed some six acres of waste land of a manor, and built a cottage thereon. He was allowed to remain in possession, without acknowledgment or payment of rent, till 1845, when the steward of the manor served him with a declaration and notice in ejectment. Thereupon he consented to give up four acres of the land on being allowed to continue for his life in possession of the other two acres and of the cottage. He died in 1861. Here again a fresh tenancy had been created, and the statute ran anew from 1845. In *Hodgson* v. *Hooper* (1860), 3 E. & E. 149, land, which was waste of a manor, had been held by workhouse trustees since 1781 under such circumstances that their possession, whether under a tenancy at will or not, was not adverse to the lord before 1833. In 1835 new trustees were admitted. This created a new tenancy at will and the lord's title, therefore, was existing in 1840. "We are clearly of opinion," said Cockburn, C.J., in delivering the judgment of the Court, "that if the first tenancy was a tenancy at will, the admission in 1835 operated to create a fresh tenancy of the same kind. If before the right of entry upon a tenant at will is gone, the tenancy is put an end to, and a new tenancy at will created by fresh agreement, express or implied, between the parties, then, according to the decision in *Doe* v. *Turner* (1840), 7 M. & W. 226, with which we concur, a

fresh right of entry accrues, and an additional period of [thirteen] years must run before that entry would be barred."

Intention to create new tenancy.

In *Day* v. *Day* (*supra*) it was said that, in order to constitute a new starting-point for the statute, "the agreement for a new tenancy should be made by the parties with a knowledge of the determination of the former tenancy, and with an intention to create a fresh tenancy at will." But where the former tenancy is determined in accordance with a technical rule, as by a mortgage of the reversion, the parties have no actual knowledge of it, nor do they really intend to create a new tenancy. In *Jarman* v. *Hale*, [1899] 1 Q. B. 994, the above passage was treated as *obiter dictum*, and Channell, J., said, "It seems to me that if you find a definite acknowledgment from the tenant that he is holding by permission of the other, that is all you want." In that case the defendants had occupied a house by permission of the plaintiff without payment of rent, from 1883. In 1893 the plaintiff executed a legal mortgage of the house which came to the knowledge of the defendants in 1894, when, therefore, the tenancy at will was determined. Subsequently the defendants filled up an income tax paper in which they described the plaintiff as being the owner of the house, and themselves the occupiers, and in conversation with other persons they admitted that they were then tenants at will. These admissions were held to be sufficient to show that, after the determination of the first tenancy at will, a new tenancy was created, and the statute, therefore, ran only from 1894. When a tenancy at will has been determined by notice to quit, the continuance of the tenant in possession cannot be construed as the creation of a new tenancy, if the landlord declines to receive rent and tells the tenant that he is a trespasser. There must be consent, express or implied, on the part of the lessor: *Cusack* v. *Farrell* (1886), 18 L. R. Ir. 494.

(ii.) *Yearly Tenancies.*

In the case of a tenancy from year to year without any lease in writing, the landlord's right of entry is deemed to have accrued at the end of the first year, or at the last receipt of rent, whichever date is the later:—

R. P. L. A., 1833, s. 8. Right accrues at end of first

> "When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the

right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or to bring an action to recover such land or rent shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen). year or last receipt of rent.

The word "rent" is used in this section three times: on the first two occasions it means rent-charge; on the last, rent reserved on a lease: *Doe* v. *Angell* (1846), 9 Q. B. p. 356 (*supra*, p. 23); see *Baines* v. *Lumley* (1868), 16 W. R. 674. "Rent."

To constitute a lease in writing, which will take the case out of sect. 8, there must be an instrument passing an interest in the land, and not merely showing the conditions of the holding: *Doe* v. *Gower* (1851), 17 Q. B. 589. Lease in writing.

A tenancy from year to year may be created expressly, either by parol or in writing, or it may be implied from payment of rent upon entry without a valid lease: *Doe* v. *Bell* (1793), 5 T. R. 471; *Clayton* v. *Blakey* (1798), 8 T. R. 3; 2 Sm. L. C. 9th ed., 110, 118; *Crawley* v. *Price* (1875), L. R. 10 Q. B. 302; or from payment of rent by a tenant who holds over after the expiration of his lease: *Archbold* v. *Scully* (1861), 9 H. L. C. p. 387. Payment of rent, however, does not of itself create a tenancy from year to year. It is only evidence of a tenancy (*Finlay* v. *Bristol and Exeter Ry. Co.* (1852), 7 Ex. 409), and though, in general, it is conclusive evidence (*Doe* v. *Watts* (1797), 7 T. R. 83; *Bishop* v. *Howard* (1823), 2 B. & C. 100), this is not necessarily the case; and it is open to the party to show the circumstances under which the rent was received, as that he was ignorant of the death of a person for whose life the premises were held (*Doe* v. *Crago* (1848), 6 C. B. 90), or that a tenancy at will had been expressly created: *Doe* v. *Cox* (1847), 11 Q. B. 122. The rent need not be reserved in money: *Doe* v. *Benham* (1845), 7 Q. B. 976; *Doe* v. *Billett* (*ibid.*, 983). Creation of yearly tenancy.

The payment of rent does not support the tenancy and prevent the possession from being adverse. It simply gives a starting-point for the statute: *Baines* v. *Lumley* (1868), 16 W. R. 674. And for this purpose the payment must be made strictly in respect of rent. "Where," said Lord Cranworth, C., in *Att.-Gen.* v. *Stephens* (1855), 6 D. M. & G. 111, at p. 146, "the tenancy is, as in this case, disputed, the circumstances Payment of rent.

connected with the annual payments are evidently most important; for if the person paying made the payment expressly or impliedly on account of something else than rent of land of which he was the tenant, this would not be a payment of rent within the meaning of the clause." The payment of rent, though it is similar in its effect to an acknowledgment of title which must be in writing (*infra*, p. 322), may be proved by the parol admission of the tenant: *Doe* v. *Beckett* (1843), 4 Q. B. 601.

Receipt of rent after lapse of 12 years.

The section gives two alternative points for the commencement of the statute—the end of the first year of the tenancy, *or* the last receipt of rent; and hence, although such last receipt may be more than twelve years after the end of the first year, the lessor is entitled to rely upon it as giving the date from which the statute is to run: *Bunting* v. *Sargent* (1879), 13 C. D. 330. *Primâ facie*, it might be supposed that the title is extinguished at the end of the twelve years, and that a subsequent payment of rent would be as ineffectual to revive it as an acknowledgment: *cf. Sanders* v. *Sanders* (1881), 19 C. D. 373, C. A. But in *Bunting* v. *Sargent*, Jessel, M.R., observed that sect. 34 only extinguishes the title "at the determination of the period limited by this Act," and that under sect. 8 the statutory period was to be reckoned from the last receipt of rent, whenever this took place, provided only it was subsequent to the end of the first year of the tenancy.

Arrears of rent.

When the title of the landlord is extinguished by the lapse of the statutory period, his right to arrears of rent is also extinguished, and he cannot recover them, either directly or indirectly: *Re Jolly*, [1900] 2 Ch. 616, C. A.

Payment of head-rent by yearly under-tenant.

Where land held on lease for a term of years is sublet to a yearly tenant, and the latter voluntarily pays the head-rent direct to the superior landlord, it has been said that this payment must be deemed to be made on behalf of his immediate landlord; it would operate, on this view, as a payment to him, and the under-tenant could not set up the statute against his landlord: *Hayes* v. *Woodley* (1852), 3 Ir. Ch. R. 142; *cf. Twiss* v. *Noblet* (1869), Ir. R. 4 Eq. p. 80. But this is not so. It is a question of fact, to be decided on all the circumstances of the case, whether the payment is made by arrangement with and on behalf of the intermediate lessee, so that his title is saved: see *Drew* v. *Earl of Norbury* (1846), 3 Jo. & Lat. 267. And in the absence of evidence of such an arrangement, the payment of the head-rent does not

operate as a payment on account of the sub-rent. Consequently, the right of the intermediate lessee to recover the land is barred and his title extinguished at the end of twelve years from the last receipt of the sub-rent; he cannot recover arrears of the rent: *Grogan* v. *Regan*, [1902] 2 I. R. 196, 201, C. A.; and the term belongs thenceforth to the under-tenant, who is entitled to be registered as owner of it: *Re Hayden*, [1904] I. R. 1.

(iii.) *Terms of Years.*

Statute does not run till end of term.

In the case of tenancies for a term of years, and of yearly tenancies under a lease in writing, the R. P. L. Acts have no provision interfering with the general rule that, since the lessor has no present right to possession of the land, time does not run against him until, by the determination of the term, his reversion falls into possession. It makes no difference that rent has not been paid for more than twelve years: *Doe* v. *Oxenham* (1840), 7 M. & W. 131; and since the statute only bars rent of the nature of rent-charge (*Grant* v. *Ellis* (1841), 9 M. & W. 113, *supra*, p. 22), six years' arrears of rent may be recovered at any time during the currency of the term: *Archbold* v. *Scully* (1861), 9 H. L. C. 360. And provided the rent is a conventional rent reserved upon a lease, it is not an objection that no reversion remains in the lessor, as where an underlease is created for the whole of the residue of the term: *Re Turner's Estate* (1861), 11 Ir. Ch. Rep. 304.

Void lease.

If the lease is void, time runs against the lessor from the date when possession is taken, unless a yearly tenancy is inferred from payment of rent. In *Magdalen Hospital* v. *Knotts* (1879), 4 App. Cas. 324, a lease was granted in 1783 by the Governors of the hospital for 99 years at a peppercorn rent "if lawfully demanded." The rent was never demanded or paid. In 1876 the Governors brought an action claiming to have the lease declared void under 13 Eliz. c. 10, as an improvident alienation of the lands of the hospital. It was held, however, by the House of Lords, that the lease was not voidable, but void *ab initio*, and that time had been running since 1783. "Holding, as I do," said Lord Cairns, C., "that the lease of 1783 was absolutely void, the respondents, or those whom they represent, must be taken to have been in possession of the property from 1783 without any title whatever; and not having paid rent to

the appellants, or in any other way entered into the relation of tenants, there is nothing to prevent the full operation of the 2nd section of the Statute of Limitations, and the right of the appellants to recover the land is in my opinion effectually barred." "If any rent," added Lord Selborne, "had been reserved and received, however small, the legal relation of a tenancy from year to year would have been created, and the Statute of Limitations could not have run." A decision upon the same principles was given by Kay, J., in *Webster* v. *Southey* (1887), 36 C. D. 9, where a lease, granted in 1747 for the building of a workhouse, was held to be void for non-compliance with the requirements of the Mortmain Act.

Existence of term in equity. *Archbold* v. *Scully.*

But the mere non-existence of a lease does not make the statute run, if the circumstances are such that in equity the lease must be assumed to exist. In *Archbold* v. *Scully* (1861), 9 H. L. C. 360, a lease granted in 1699 for lives renewable for ever came to an end by the dropping of the last life—that of A.—in 1784. In 1779 A. was claiming a fourth share under the lease, but L., who was entitled to the remaining three-fourths, had obtained possession of the whole, and in that year A. granted to L. an underlease of an undivided fourth part for 999 years at £40 a year by way of compromise. A. received the rent of £40 till her death in 1784, and afterwards it was received by A.'s successors in title till 1828, when its payment was discontinued. The original lease was not renewed till 1835. It was contended that the right to the rent was barred by the lapse of more than twenty years from 1828. At law the underlease came to an end with the head lease in 1784, and after that date the legal relation of landlord and tenant between the successors of A. and L. only existed so far as it was preserved by the annual payments of rent. Hence the statute would run from the last payment in 1828. But although the legal interest under the lease of 1699 was gone, there remained the right to have it renewed, and the lease of 1779 created a good equitable charge upon this right. Moreover, when in 1835 the original lease was actually renewed, the lease of 1779 revived in equity, and took effect out of the new lease. Hence, both from 1828 to 1835, and subsequently, there existed between the successors in title of A. and of L. the equitable relation of landlord and tenant.

Under these circumstances it was held that the rights of the parties were to be treated as though the head lease and the

underlease had been in existence throughout as legal leases, and consequently the claim of A.'s successor to the one-fourth share and to the rent of £40 was not barred. This was put upon the ground that, by virtue of sect. 24 of the Act of 1833, equitable rights are placed, for the purpose of the statute, on the same footing as legal rights. Or the case may be brought into line with the subsequent cases of *Drummond* v. *Sant* (1871), L. R. 6 Q. B. 763, and *Warren* v. *Murrey*, [1894] 2 Q. B. 648, C. A. (*supra*, p. 78), upon the principle that, had A. and her successors in title sought to disregard the lease and recover the one-fourth share, they would have been restrained in equity, and hence the statute did not run against them: see *Beighton* v. *Beighton* (1895), 43 W. R. 685.

Disclaimer of lessor's title by lessee.

During the continuance of the lease the lessee may disclaim the lessor's title, either by direct repudiation of the relation of landlord and tenant, or by a claim to hold possession on a ground inconsistent with the existence of that relation: *Doe* v. *Stanion* (1836), 1 M. & W. p. 703; *Doe* v. *Cooper* (1840), 1 M. & Gr. p. 139; *Vivian* v. *Moat* (1881), 16 C. D. 730. Or, in fraud of his landlord, he may give up possession to a third party with the intention of enabling such third party to set up a hostile title: *Doe* v. *Flynn* (1834), 1 C. M. & R. 137. But though such disclaimer—provided, in the case of a term, though not, perhaps, in the case of a tenancy from year to year, it does not rest upon mere words: *Doe* v. *Wells* (1839), 10 A. & E. 427—may be a ground of forfeiture, it does not in itself make the statute run against the lessor: *Archbold* v. *Scully* (1861), 9 H. L. C. p. 381.

Surrender of lease.

The lease may be determined by surrender, either express or implied, and a surrender is implied upon the granting of a new lease to the same tenant: *Lyon* v. *Reed* (1844), 13 M. & W. 285; but under the circumstances of such surrender and fresh grant the lessee gains no advantage from the statute. The lessor's estate falls into possession upon the surrender, but by the new lease he is again put in the position of reversioner, and on the determination of the new lease he will have a right of entry. If the new lease is void, there is no implied surrender of the old lease, and the statute does not run till the determination of the original term: *Corporation of Canterbury* v. *Cooper* (1908), *Times*, July 2.

As to surrender when a stranger is in possession, see *infra*, p. 110.

(iv.) *Encroachments by the Tenant.*

Encroachments are for benefit of landlord.

In general, a possessory title obtained by a tenant to waste—that is, uninclosed—land adjoining or near to his holding is obtained for the benefit of his landlord, and the land so acquired must be given up with the demised land at the end of the tenancy. "It is clearly settled," said Parke, B., in *Doe* v. *Rees* (1834), 6 C. & P. p. 610, "that encroachments made by a tenant are for the benefit of his landlord, unless it appear clearly by some act done at the time of the making of the encroachments, that the tenant intended the encroachments for his own benefit, and not to hold them as he held the farm to which the encroachments were adjacent." And in *Whitmore* v. *Humphries* (1871), L. R. 7 C. P. 1, Willes, J., stated the rule as follows:—"By the rule of law applicable to this subject the landlord is entitled at the determination of the tenancy to recover from the tenant, not only the land originally demised, but also any land which the tenant may have added to it by encroachment from the waste, such encroachment being deemed to be made by him as tenant as an addition to his holding, and consequently for the benefit of his landlord, unless it is made under circumstances showing an intention to hold it for his own benefit alone, and not as part of his holding under the landlord": see *Doe* v. *Mulliner* (1795), 1 Esp. 460; *Andrews* v. *Hailes* (1853), 2 E. & B. p. 353; *Kingsmill* v. *Millard* (1855), 11 Ex. pp. 315, 318.

The rule applies to an inclosure made by a lessee for life: *Doe* v. *Jones* (1846), 15 M. & W. 580; *Doe* v. *Tidbury*, 14 C. B. p. 325; but it is restricted to the case of inclosures of waste land: *Lord Hastings* v. *Sadler* (1898), 79 L. T. 355. It is doubtful whether it applies to encroachments by a copyholder so as to make the land thus taken part of the copyhold tenement: *Att.-Gen.* v. *Tomline* (1880), 15 C. D. 150, C. A.

Encroachment separated from holding.

The rule applies, not only where the land inclosed adjoins the demised premises, but also where it is separated from them (*per* Parke, B., in *Kingsmill* v. *Millard* (1855), 11 Ex. 313), provided the distance is not so great that the tenant must be presumed to have inclosed for his own benefit. "It is not necessary," said Willes, J., in *Earl of Lisburne* v. *Davies* (1866), L. R. 1 C. P. p. 268, "that the encroachment should be conterminous with the holding. It is enough if it is so near that by reason of its nearness the tenant gained the opportunity of

making it, and the landlord might have tacitly acquiesced in it." In that case there was nothing but a river and a strip of waste land between the demised premises and the inclosure, and it was held that the distance was not a circumstance to rebut the ordinary presumption; and so, too, in *Andrews* v. *Hailes* (1853), 2 E. & B. 349, where only a road intervened.

Subsequent severance of encroachment.

And though it is said that, to exclude the rule, the intention of the tenant to inclose for himself must be shown at the time, this does not seem to prevent a subsequent severance of the inclosure from the demised premises. "Even though," said Parke, B., in *Kingsmill* v. *Millard* (1855), 11 Ex. p. 318, "at the time of making the encroachment there is nothing to rebut the presumption that the tenant intended to hold it as a portion of his farm, yet circumstances may afterwards occur by which it may be severed from his farm; for instance, if the tenant conveys it to another person, and the conveyance is communicated to the landlord, then it can no longer be considered as part of the holding. But if the landlord is allowed to remain under the belief that the encroachment is part of the farm, the tenant is estopped from denying it, and must render it up at the end of the term as a portion of the holding." Where a conveyance in fee is made by the tenant, but the deed is not delivered and possession under it is not taken, this will not prejudice the landlord's claim: *Doe* v. *Jones* (1846), 15 M. & W. 580.

Encroachment on land of landlord.

The presumption that the land inclosed is added to the holding arises also where the land belongs to the landlord, and it is immaterial that he has assented to the encroachment. This does not make the tenant tenant at will of the inclosed portion, so as to enable him to gain a title under sect. 7 of the R. P. L. A., 1833. "The fact," said Willes, J., in *Whitmore* v. *Humphries* (1871), L. R. 7 C. P. p. 6, "that the landlord knows that the tenant is encroaching on his land, and from good nature takes no notice, and does not turn the tenant out, but allows him to hold the encroachment on the same terms as if it had been part of the holding, cannot, in good sense, put the landlord in a worse position than if the tenant had taken originally without any assent, and by mere wrong unknown to his landlord."

Taking in land which is not waste.

Where the tenant takes in land belonging to his landlord which was not originally included in his holding, but it is not

waste land, so that it is not subject to the above presumption, it is a question of fact to be decided on all the circumstances of the case whether he has taken it in as part of his holding; if he has, and if he has held it for more than twelve years, he is entitled to retain it till the end of his term, but must then give it up to the landlord with the original land: *Tabor* v. *Godfrey* (1895), 64 L. J. Q. B. 245. In *Doe* v. *Massey* (1857), 17 Q. B. 373, the owner of plots A and B, who had demised A to Massey for building, expressly refused to grant him a lease of B or to give permission to build on it, telling him that if he built there, he must build on his own responsibility. Subsequently, Massey built on B, the owner not interfering and never receiving any rent in respect of B. It was held that B was not to be regarded as added to the demised premises.

And where a person is in possession of land under such circumstances that the statute is running in his favour, and he takes a lease of adjoining land belonging to the same owner, this does not alter the character of his previous possession so as to lead to the inference that the land which he was occupying as his own he afterwards occupies as part of the demised premises: *Dixon* v. *Baty* (1866), L. R. 1 Ex. 259.

(2) *In Favour of Strangers.*

(i.) *Adverse Occupation.*

Adverse occupation during lease.

The effect of adverse occupation of land by a stranger during the currency of a lease depends on the same considerations as in any other case where the immediate right to possession is in one person, and the reversion or other future interest is in another. As against the lessee, the statute runs from the time when the wrongful possession commences: *Poole* v. *Griffith* (1864), 15 Ir. C. L. R. p. 290. As against the lessor, it does not run until the termination of the lease. But from that date it runs against him and against any person claiming an interest subsequently created by him, such as a lessee claiming under a lease granted subsequently to the expiration of the old lease: *Kennedy* v. *Woods* (1868), Ir. R. 1 C. L. 76; 2 C. L. 436, C. A.

Termination of lease by surrender.

Where the lease is terminated by surrender, whether express or implied, but vacant possession is not given by the lessee to the lessor, the effect, as regards the lessor's right of entry, will

be different according as the land is at the date of surrender in the occupation of a stranger or of an under-lessee. It was held in *Corpus Christi College* v. *Rogers* (1879), 49 L. J. Q. B. 4, C. A., that, in the case of a surrender and simultaneous grant of a new lease, there is no moment when the lessor is entitled to enter, and consequently the statute does not commence to run against him. But in *Ecclesiastical Commissioners* v. *Rowe* (1880), 5 App. Cas. 736, Lord Selborne, C., pointed out that an estate in possession vests in the lessor out of which the new leasehold interest is derived, and if the occupier is a person without title —whether a trespasser or a disseisor—the lessor's estate in possession carries with it the right to enter upon the land, and the statute begins to run. But if the occupier is an under-lessee, rightfully in possession under the lessee, he is not affected by the surrender. Consequently the lessor has no such right of entry, and the statute does not run against him: see also *Ecclesiastical Commissioners* v. *Treemer*, [1893] 1 Ch. 166. If, however, at the date of surrender a stranger has already gained a title against the lessee, the latter has no right of possession, and he cannot by surrender confer a right of entry upon the lessor. In this case, the lessor's right of entry does not arise until the natural expiration of the term, and, until then, the statute does not run against him: *Walter* v. *Yalden*, [1902] 2 K. B. 304. Where the lessees are trustees, and a beneficiary is in possession, his possession is the possession of the trustees. Hence, if leases of estates X and Y are vested in the same trustees upon different trusts, and the X beneficiaries go into possession of part of Y, the possession of both estates is throughout in the trustees, so that successive surrenders and grants of new leases will duly take effect, and will prevent the X beneficiaries from acquiring a title to Y: *East Stonehouse Urban Council* v. *Willoughby Brothers*, [1902] 2 K. B. 318.

(ii.) *Adverse Receipt of Rent.*

Where a stranger is in wrongful receipt of rent of 20*s.* or more reserved by a lease in writing, the statute runs against the lessor from the first such receipt:—

"When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing by which a rent amounting to the yearly sum of

R. P. L. A., 1833, s. 9. Lessor's right

of entry accrues on wrongful receipt of rent.

twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent subject to such lease, or of the person through whom he claims, to make an entry or distress or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled."

Receipt of rent equivalent to possession.

Previously to 1833 adverse receipt of rent was not an actual disseisin of the freeholder, and according to *Doe* v. *Danvers* (1806), 7 East, 299 (see argument in *Cholmondeley* v. *Clinton* (1821), 4 Bligh. p. 37), it did not affect his right to recover the land at the end of the term. But the receipt of rent amounts to possession of the estate for the purpose of making the receiver the apparent owner, and an adverse receipt is virtually a dispossession of the true owner, and ought to have the same effect on his title as dispossession: see First Report of Real Property Commissioners, p. 47. Accordingly the above section provides that when any person is in possession of land by virtue of a lease in writing, by which a rent of twenty shillings or upwards is reserved, and the rent is received by some person wrongfully claiming to be entitled to the reversion, the true reversioner's right of entry or action shall be deemed to have first accrued at the time of the first wrongful receipt of rent. "The new statute," said Lord St. Leonards in *Scott* v. *Nixon* (1843), 2 Con. & L. p. 191, "put an end to the doubt about the effect of the receipt of rent, for under the old law it could not be deemed an ouster, and no man could by such wrong divest a right: the new Act, however, made receipt of rent equivalent to possession": *cf. Twiss* v. *Noblet* (1869), 4 Ir. R. Eq. p. 78. The section also applies to the possible case of a lease of a rent-charge, and has been referred to as an illustration of the different meanings given in the statute to "rent": see *Doe* v. *Angell* (1846), 9 Q. B. p. 356 (*supra*, p. 23).

The effect of sect. 9, taken in connection with sect. 34, is to extinguish the title of the reversioner; the nature of the title acquired by the adverse receiver of the rents will be considered subsequently: *infra*, p. 126.

Actual receipt.

Since the operation of the statute depends upon the receipt of rent—a receipt which must be actual and not constructive merely (*Twiss* v. *Noblet*, *supra*)—it follows that the lessee can gain no title under the section by simply withholding rent: *Doe* v. *Oxenham* (1840), 7 M. & W. 131; *Grant* v. *Ellis* (1841), 9 M. & W. 113; nor can a stranger gain a title to the freehold by entering during the continuance of the lease: *Chadwick* v. *Broadwood* (1840), 3 Beav. 308. He must receive the rent from the tenant, and, though it is not necessary that he should receive it regularly, he must in effect receive it for the statutory period: see *Scott* v. *Nixon* (*supra*).

Wrongful claim to reversion.

There must not only be an actual receipt of rent by a person other than the true reversioner, but he must also wrongfully claim the reversion. Hence it is necessary to consider the character in which he receives the rent, and, in setting up sect. 9 as a defence, the receipt of the rent must be expressly stated to be wrongful, or facts must be alleged which are inconsistent with a rightful receipt: *Sloane* v. *Flood* (1855), 5 Ir. C. L. R. 75. The statute does not run, for instance, where the receipt is really in satisfaction of a rent-charge: *Doe* v. *Godsill* (1840), 4 Q. B. 603, n (*b*); or of jointure, even though there is a surplus of which no account is given to the reversioner: *Shaw* v. *Keighron* (1869), Ir. R. 3 Eq. 574; nor does it run where the rent is received by a person who purports to be the agent of the reversioner: *Lyell* v. *Kennedy* (1889), 14 App. Cas. 437 (*supra*, p. 31).

Shaw v. *Keighron.*

"To ascertain," said Walsh, M.R., in *Shaw* v. *Keighron* (at p. 578), "whether a person claims wrongfully within the meaning of [the] section, I think it is necessary to go beyond the mere circumstance that some one not entitled to the rent has received and kept it. The section requires not only that the rent should have been received by a person other than the person rightfully entitled, but that it should have been received under some claim of title, and that a wrongful one. For example, if rent were received by a person falsely pretending to be agent to the rightful owner, and who never accounted for it, this would not bar the rightful owner. The mere fact that the rent

was received and kept by a person other than the rightful owner, no doubt raises a presumption that it was received under a wrongful claim of title; but that is only a presumption, and may be negatived by the circumstances. Without attempting to define what is requisite to constitute a wrongful claim to land within the meaning of the Act, I think it may be taken that receipt of the rent by a person receiving it under a claim supposed to be consistent with—and not in assertion of any right adverse to—the title of the right owner of the reversion, though the claim be unfounded, is not such a receipt as will bar the reversioner under this section." *Lyell* v. *Kennedy* (*supra*) did not fall within the 9th section, inasmuch as the leases were not in writing, but Lord Selborne considered that the effect of receipt by an agent was the same whatever the nature of the tenancy, and after quoting with approval the first part of the above passage from the judgment in *Shaw* v. *Keighron*, he continued (p. 460): "I am of opinion that what was said by the learned judge is equally true of any other case in which the statute is set up as a bar to the true owner by virtue only of the receipt of rent from tenants in possession. I think that such receipt of rent, in order to exclude the true owner, must always be by the person wrongfully claiming, and not receiving, or claiming to receive, on behalf of the true owner. When the true owner can and does ratify an agency undertaken on his behalf, though without his antecedent authority, the case is the same as though he had himself received the rents."

Lyell v. *Kennedy.*

But for a claim to be "wrongful" it is not necessary that it should be improper. It is enough that it is inconsistent with the title of the true owner, and this requirement is satisfied though it is put forward under a mistake, and without any intention of depriving the true owner of his property. In *Williams* v. *Pott* (1871), 12 Eq. 149, the joint application of this principle and of the doctrine of agency had the effect of barring an owner who was himself in actual receipt of the rent of the land. A tenant in tail died in 1848, without having barred the estate tail, but having by his will devised all his real estate to his wife. The eldest son and heir in tail entered into receipt of the rents, and received them until 1866 as agent for his mother. From that year until her death in 1869 the rents were still received by an agent on her behalf. It was held by Lord Romilly, M.R., that, through the agency of her son, the

Claim need not be improper.

mother had been in receipt of the rents under a wrongful claim of title, and he rejected the contention that "wrongfully" implied an intentional and improper claiming of the rent. "It means," he said, "a person not entitled, who makes a claim to the rents against a person who is entitled": see *Hounsell* v. *Dunning*, [1902] 1 Ch. 512.

Severance of reversion.

Where premises are let for a term at a single rent, and subsequently the reversion to a small part becomes vested in A., while the reversion to the bulk of the premises is vested in B., the receipt of the entire rent by B. does not give him a title to A.'s portion of the premises. A. is not entitled to any separate part of the rent until there has been an apportionment, and B.'s receipt of the whole rent is not wrongful: *Layburn* v. *Gridley* (1892), 40 W. R. 474.

Section IX.—Possessory Titles.

(1) *Continuous Possession for the Statutory Period.*

Possession for statutory period confers a title.

When there has been continuous possession for the statutory period by the person in whose favour the statute began to run, or by such person and by other persons claiming through him, the title of the true owner is at the end of such period extinguished, and the title to the land is vested in the possessor.

R. P. L. A., 1833, s. 34. Title extinguished.

> "At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period shall be extinguished."

Under the former Statutes of Limitation (32 Hen. 8, c. 21; 21 Jac. 1, c. 16) the lapse of time barred the true owner's remedy, but did not otherwise affect his title: *Hunt* v. *Burn* (1702), 2 Salk. 422. But now the title is, after the lapse of the statutory period, absolutely extinguished, and it cannot be revived by re-entry: *Brassington* v. *Llewellyn* (1858), 27 L. J. Ex. 297; *Bryan* v. *Cowdal* (1873), 21 W. R. 693; *cf. Jack* v. *Walsh* (1842), 4 Ir. L. R. 254; or by acknowledgment under sect. 14: *Sanders* v. *Sanders* (1881), 19 C. D. 373, C. A., overruling *Stansfield* v. *Hobson* (1853), 3 D. M. & G. 620; see *Re Hobbs* (1887), 36 C. D. 553. Where a lessee dies intestate, and one of the next-of-kin enters and holds for twelve years, and then takes out administration, his returning the leaseholds as part of the intestate's effects has no greater effect than an acknowledgment, and does not revive the intestate's interest for the benefit of the estate: *Re M'Clure and Garrett's Contract*, [1899] 1 I. R. 225. *Gibson* v. *Wise* (1887), 35 W. R. 409, where the owner saved his title by granting a lease after the statutory period, is opposed to the authorities.

Similarly a rent-charge cannot be revived by a payment made after it has been extinguished by non-payment for the statutory period: see *Hanks* v. *Palling* (1856), 6 E. & B. 659. And a judgment, obtained by default, for arrears of a tithe rent-charge which has been extinguished by the statute, does not revive the rent-charge on the ground of estoppel: *Irish Land Commission* v. *Ryan*, [1900] 2 I. R. 565, C. A.

The New Title.

The new title.

It has been said that the effect of the statute is "to make a parliamentary conveyance of the land to the person in possession" after the period of twelve years has elapsed: *per* Parke, B., in *Doe* v. *Sumner* (1845), 14 M. & W. 39; *cf. Scott* v. *Nixon* (1843), 3 Dr. & War. p. 407; *Incorp. Society* v. *Richards* (1841), 1 Dr. & War. p. 289; *Burroughs* v. *M'Creight* (1844), 1 Jo. & Lat. p. 303; *Dawkins* v. *Lord Penrhyn* (1877), 6 C. D. p. 323. Thus a person who has gained a title adverse to a mortgagor is entitled to redeem: *Fletcher* v. *Bird* (1896), Fisher on Mortgages, 5th ed. 972. And under a system of registration of title, the possessor, when this new title is complete under the statute, is entitled to be registered as owner: *Re Hayden*, [1904] 1 I. R. 1, on the Local Registration of Title (Ireland) Act, 1891.

But there is, in fact, no conveyance or transfer of the old title. The statute confers a new title, which is independent of the old title. Hence, where the title of a lessee is barred by adverse possession during the currency of the lease, the lease cannot be treated as assigned to the possessor so as to render him liable on the covenants: *Tichborne* v. *Weir* (1892), 67 L. T. 735, C. A. And similarly, since the title arises under the negative provisions of the statute, the possessor cannot enjoy any right, such as a way of necessity, which assumes a grant: *Wilkes* v. *Greenway* (1890), 34 Solicitors' Journal, 673, C. A.

Paramount rights.

But though the title of the former owner is extinguished, the land remains subject to rights which were not incident, but paramount to, his estate. Of this nature are legal easements, and also the restrictions on the use of the land—or negative easements—created by restrictive covenants entered into by the former owner or one of his predecessors in title. Such covenants confer upon the covenantee an equitable interest in the land which is binding on all persons to whom the land comes, until there is a purchaser for value without notice. They are binding, therefore, on persons acquiring a title by possession, and on purchasers from them who have either actual or constructive notice. And a purchaser has constructive notice of covenants which he would discover if he called for and investigated the title for forty years: *Re Nisbet and Potts' Contract*, [1906] 1 Ch. 386, C. A. And upon the same principle, apparently, express trusts create interests paramount to the estate of the trustee, and are not necessarily extinguished at

Restrictive covenants.

the same time as the trustee's title: *supra*, p. 80. And a person who acquires a title to a leasehold interest by possession takes subject to all the incidents of the tenure other than liability under the covenants in the lease; he takes, therefore, subject to a statutory restriction on assignment: *O'Connor* v. *Foley*, [1906] 1 I. R. 20, C. A.

Possessory title forced on purchaser.

The Court has sometimes forced a possessory title on a purchaser: *Scott* v. *Nixon* (1843), 3 Dr. & War. 388; *Tuthill* v. *Rogers* (1844), 1 Jo. & Lat. 36, 72; *Games* v. *Bonnor* (1884), 54 L. J. Ch. 517, C. A.; but this is only done where a particular objection, apparent on the face of the title as shown, is cured by long possession. The Court does not compel the purchaser to take a leap in the dark; *per* Farwell, J., *In re Nisbet and Potts' Contract* (*supra*). And under an open contract it is not sufficient to show a possessory title for twelve years; a title for the full forty years must be shown: *Jacobs* v. *Revell*, [1900] 2 Ch. 858, p. 869; though twelve years' possession may be enough to extinguish an outstanding legal estate and vest the legal estate in the possessor: *Re Cussons, Ltd.* (1904), 73 L. J. Ch. 296. Where the conditions of sale of copyhold property debar the purchaser from requiring evidence of the payment of a charge more than twelve years old, except a statutory declaration at his expense that there has been no payment or claim within twelve years, and there appears on the Court rolls an entry before that period of a conditional surrender by way of mortgage, the purchaser cannot require this to be vacated: *Hopkinson* v. *Chamberlain*, [1908] 1 Ch. 853.

Nature of the new title.

The new possessory title is in general an estate in fee simple. If the possessor is a disseisor, the true owner's estate has been turned upon the disseisin to a right of entry, and the fee is already vested in the disseisor. In such a case the only effect of the completion of the statutory period is to extinguish this right of entry, and to make the disseisor's estate indefeasible: *cf. Keefe* v. *Kirby* (1857), 6 Ir. C. L. R. p. 594. If, on the other hand, the possessor, although the statute is running in his favour, is no disseisor—as where he is tenant at sufferance or tenant at will—the statute has a greater effect, and although, while the statute is running, he is no more than possessor, yet, at the end of the statutory period, he is at once clothed with the seisin. There is no longer any estate vested in the former owner, and since the law does not contemplate that the

ownership shall be vacant (*cf.* 2 Sm. L. C., 11th ed., p. 720), the possessor becomes seised in fee. "I am clearly of opinion," said Sugden, L.C., in *Scott* v. *Nixon* (1843), 3 Dr. & War. p. 405, "that by the effect of the statute, after the proper period of limitation has passed, the legal fee simple is in the party who has been in possession during that period." As to disseisin, see *Taylor* v. *Horde* (1757), 2 Smith's L.C., 11th ed. 575.

But where a mortgagee goes into possession so that the statute runs in his favour, and dies before the mortgagor's equity of redemption is barred, the mortgagee's title devolves as personalty and goes, in the event of his intestacy, to his next of kin: *Re Loveridge*, [1902] 2 Ch. 859.

Joint tenancy.

If two or more persons are in possession, they acquire a title in joint tenancy, and on the death of one, before the tenancy is severed, his share goes to the survivor: *Ward* v. *Ward* (1871), 6 Ch. 789; *Bolling* v. *Hobday* (1882), 31 W. R. 9; *Smith* v. *Savage*, [1906] 1 I. R. 469; unless, indeed, the circumstances show that their interest must be a tenancy in common, as where beneficiaries entitled in common acquire by possession the legal estate: see cases cited in the next paragraph.

Possessory Leasehold Title.

Dispossession of lessee.

Where a stranger enters and dispossesses a lessee, this is in strictness a disseisin of the freeholder (Prest. Abstr. II. 296), and a freehold title is vested in the disseisor: *cf.* Litt. s. 411; Co. Litt. 250b; though the statute does not run against the freeholder till the expiration of the term. But this technical doctrine of disseisin cannot now be relied on. Any interest acquired by one who enters during the continuance of a lease is limited to the duration of the term, and is a leasehold interest: *Rankin* v. *M'Murtry* (1889), 24 L. R. Ir. p. 297. Moreover, it is subject, as regards the lessor, to all the lessor's rights except such as arise out of contract: *O'Connor* v. *Foley*, [1906] 1 I. R. 20, C. A. (*supra*, p. 118). Next-of-kin beneficially entitled under an intestacy, who enter without taking out administration, become after the statutory period entitled to the legal estate as tenants in common in accordance with their beneficial interests: *Marten* v. *Kearney* (1903), 36 Ir. L. T. R. 117. Thus, if a widow of an intestate enters on his leaseholds on behalf of herself and an infant son, she acquires one-third for herself and two-thirds for the son: *MacCormack* v. *Courtney*, [1895] 2 I. R. 97. But if

some of the next-of-kin enter to the exclusion of the rest, they become tenants in common of their own original shares, and joint tenants of the shares of the excluded next-of-kin: *Smith* v. *Savage*, [1906] 1 I. R. 469. This refinement was overlooked in *Coyle* v. *M'Fadden*, [1901] 1 I. R. 298.

If a stranger enters during a yearly tenancy, and pays the rent to the landlord, he acquires at once a tenancy by estoppel against the landlord; but when the statute has run in his favour against the lessee, this tenancy by estoppel is no longer required, and he becomes entitled to an ordinary tenancy from year to year: *Jackson* v. *M'Master* (1890), 28 L. R. Ir. 176, C. A.; *Mulcaire* v. *Lane-Joynt* (1893), 32 L. R. Ir. 683, C. A.

(2) *Non-Continuous Possession.*

Successive intruders.

If, before the statutory period has expired, the possession is left vacant, the true owner is deemed to be in possession again, and the statute ceases to run: *Trustees Agency Co.* v. *Short* (1888), 13 App. Cas. 793; see *Willis* v. *Earl Howe*, [1893] 2 Ch. 545; *Samuel Johnson and Sons* v. *Brock*, [1907] 2 Ch. 533. But if the first possessor is followed by another intruder, who in turn is followed by a third, all within the statutory period, so that there is a succession of independent possessions, the extent of the interest of each possessor, both while the statute is running against the true owner, and after it has run, depends upon the nature of the title which must be shown by a plaintiff in an action for recovery of land.

Title in Ejectment.

Recovery of possession.

The general rule in an action to recover possession of land is the same as in the old action of ejectment. The plaintiff must recover on the strength of his own title, not on the weakness of the defendant's: *Goodtitle* v. *Baldwin* (1809), 11 East, p. 495. "For possession gives the defendant a right against every man who cannot show a good title": *per* Lord Mansfield in *Roe* v. *Harrey* (1769), 4 Burr. p. 2487. And this has sometimes been interpreted as meaning that the plaintiff's title must be good against all the world, so that he will fail if it can be shown that the real title is in another. Possession, indeed, though shown for a short time only, was held to be sufficient to confer the right to recover the land as against a wrongdoer: *Doe* v. *Dyball* (1829), Moo. & M. 346, note; *Doe* v. *Martin* (1841), Car. & M. 32. But

in *Doe* v. *Barnard* (1849), 13 Q. B. 945, these cases were treated as having been decided upon the ground that "possession is *primâ facie* evidence of title, and, no other interest appearing in proof, evidence of seisin in fee"; and it was said that they did not warrant the statement that "possession alone is sufficient in ejectment (as it is in trespass) to maintain the action."

Doe v. *Barnard.*

In *Doe* v. *Barnard*, now overruled, there was a possession by a tenant at will from 1815 to 1834, then a possession by his widow, but not under him, till 1847. In 1845 a mortgagee from the owner, under a mortgage dated in 1829, attempted to recover possession from the widow in the earlier action of *Doe* v. *Carter* (1847), 9 Q. B. 863, but his right was held to be barred. Subsequently Barnard, who claimed under the mortgagee, managed to get into possession, and *Doe* v. *Barnard* (*supra*), was an action of ejectment brought by the widow to recover possession from him. It was held that the widow would have succeeded had she shown only her own possession for thirteen years, since this would have been, as just stated, *primâ facie* evidence of seisin in fee. However, she did more, "for she proved the possession of her husband before her for eighteen years, which was *primâ facie* evidence of his seisin in fee; and, as he died in possession and left children, it was *primâ facie* evidence of the title of his heir, against which the lessor of the plaintiff's possession for thirteen years could not prevail; and, therefore, she has by her own showing proved the title to be in another, of which the defendant is entitled to take advantage."

During the husband's life his actual interest was, as already stated, a tenancy at will, and the true owner remained seised, although the statute was running against him. Hence it has been questioned whether the heir of the husband could, in fact, have recovered: *Groom* v. *Blake* (1857), 6 Ir. C. L. R. 400. In *Doe* v. *Barnard*, it appears to have been assumed, however, that, upon the extinction of the true owner's title, the presumption of seisin in fee arising from the first possession, in favour of which the statute ran, became irrebuttable; in other words, upon the statutory period being complete, the fee is to be deemed to have vested in the first adverse possessor, using the term "adverse possession" in its modern sense: *supra*, p. 7. And the case affirmed the rule, referred to above, that the plaintiff in ejectment must fail if the title appears to be in another. The rule, however, was shaken by *Davison* v. *Gent* (1857), 1 H. & N.

744, and was abolished by *Asher* v. *Whitlock* (1865), L. R. 1 Q. B. 1; and this abolition was recognized in *Perry* v. *Clissold*, [1907] A. C. 73, P. C.

Davison v. Gent.

In *Davison* v. *Gent*, premises had in 1842 been demised by the freeholders to Sherwood for twenty-one years. In 1849 they leased the same premises to Wood for a like term. No surrender of the former term, either express or by operation of law, was proved. Wood entered and died in possession, and his executor sub-let to Davison, who was forcibly ejected by the defendant, a mere wrongdoer. The outstanding lease to Sherwood constituted a defect in Davison's title, but the Court held that this did not prevent him from recovering in ejectment. "A plaintiff in ejectment," said Pollock, C.B., "is not deprived of his right to rely on his prior possession as against a mere wrongdoer, because he has brought forward documents which, if complete, might make out a perfect title, but which, on account of some defect in proof, do not establish his title to the property in question." And Bramwell, B., recognized the plaintiffs' "right to rely on their prior possession as against the defendant, who was a mere intruder."

Davison v. *Gent* did not go further than to establish that a possession which is substantially lawful shall not lose protection because of a technical defect in the possessor's title. It did not expressly recognize that a possession wrongfully taken may give a good title as against a subsequent wrongdoer; yet this, as pointed out in *Asher* v. *Whitlock* (1865), L. R. 1 Q. B. 1, is the real doctrine of English law, at any rate where the first wrongful possessor has disseised the true owner. "All the old law on the doctrine of disseisin," said Cockburn, C.J., "was founded on the principle that the disseisor's title was good against all but the disseisee." In that case Williamson had, in 1842, enclosed a piece of land, part of the waste of a manor, and had built a cottage. He died in 1860, having devised the premises to his wife during widowhood, remainder to his daughter in fee. The widow married the defendant in 1861, and these two, and the daughter, resided on the premises till the daughter's death in 1863. Later in that year the widow died, and in 1865 the heir-at-law of the daughter sued in ejectment to recover possession. Cockburn, C.J., treated the doctrine of disseisin as applicable, and held that Williamson had a right of possession upon which he could have brought ejectment, and

Asher v. Whitlock.

that this passed by his will to the daughter and so to her heir. In other words the rule that a plaintiff in ejectment must recover on the strength of his own title does not mean that he must show a title good against the world. It must be a better title than the defendant's, and if founded on disseisin it satisfies the test, since it is then good against all except the disseisee.

Perry v. *Clissold*.

This view was affirmed by the Privy Council in *Perry* v. *Clissold*, [1907] A. C. 73. Land in New South Wales was in 1891 "resumed" by the Government for a public purpose, and compensation thereupon became payable to the owner. At that date the rightful owner was unknown and out of possession, but one Clissold had in 1881 entered into possession of the land, which was then open and vacant, and had enclosed it, and had, until the time of resumption, held exclusive possession without any notice of an adverse claim. He had let it to different tenants and had received the rents for his own use, and had been rated, and had duly paid all rates and taxes in respect of the land. Clissold died in 1891, and in 1902 the executors and trustees of his will served notice of a claim to compensation, alleging that their testator "at the date of resumption was in possession of such land as the owner thereof, and in receipt of the rents of such land, and had a title thereto by possession."

The Government refused to entertain the claim and the Supreme Court of New South Wales decided in their favour. But the decision was reversed by the High Court of Australia, who were upheld by the Privy Council. "It cannot be disputed," said Lord Macnaghten, in delivering the judgment of the Court, "that a person in possession of land in the assumed character of owner, and exercising peaceably the ordinary rights of ownership, has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is for ever extinguished, and the possessory owner acquires an absolute title." And, referring to *Doe* v. *Barnard* (1849), 13 Q. B. 945, and the proposition there laid down that a possessory owner who, after dispossession by one with no better title, would fail in his action to recover the land if he showed in the course of the proceedings that the title on which he sought to recover was merely possessory, Lord Macnaghten continued: "It is, however, difficult, if not

impossible, to reconcile this case with the later case of *Asher* v. *Whitlock* (1865), L. R. 1 Q. B. 1, in which *Doe* v. *Barnard* was cited. The judgment of Cockburn, C.J., is clear on the point."

Present rule that possession is a title in ejectment.

Probably the principle of *Asher* v. *Whitlock* goes beyond the case of a disseisin, and applies whenever there is a possession in favour of which the statute is running. This is now known as an adverse possession (*supra*, p. 7), and it corresponds to the possession of a disseisor under the old law. In *Asher* v. *Whitlock* the Court (Cockburn, C.J. and Mellor, J.) do not seem to have concerned themselves with technical disseisin, and it is not clear that A.'s inclosure from the waste was a disseisin of the lord of the manor. The judgment of Cockburn, C.J., was apparently an extension of the doctrine of disseisin to dispossession, and the principle of the judgment was that mere possession gives a good title against subsequent wrongdoers. "On the simple ground," said Cockburn, C.J., "that possession is good title against all but the true owner, I think the plaintiff entitled to succeed," and see *per* Monahan, C.J., in *Nagle* v. *O'Shea* (1874), Ir. R. 8 C. L. 224.

Dixon v. *Gayfere.*

In *Dixon* v. *Gayfere* (1853), 17 Beav. 421, it was thought that, as between successive trespassers, each holding for less than twenty years, but the aggregate period exceeding twenty years, the law could not ascribe a title to any of them, neither to the first, nor to the last, nor to the one who had held the land for the longest period. "At law, no doubt," said Romilly, M.R., "the person possessed of the legal estate would obtain possession, or, if the legal estate could not be shown to be in any one, the last possessor, that is, the person actually in possession, would hold the property; but not by reason of the validity of his own title, but by reason of the infirmity of the title of the claimants." In the circumstances of the case, however, the Master of the Rolls held that the Court must ascertain the rights of the parties exactly as if the statute did not exist.

The facts in *Dixon* v. *Gayfere* were as follows:—The legal estate was during the whole period outstanding in trustees. A stranger was in possession of a share of the property from 1818 to 1837; then his widow, without title under him, till 1838; then for four years the tenants withheld their rents; and finally the Court, at the instance of the then trustee, took possession by a receiver. Inasmuch as neither the stranger, nor his widow, had been in possession for twenty years, Romilly, M.R.,

considered that neither of them had gained a title, and that, the possession being in the Court, the declaration of title must be in favour of the original equitable owner. The decision has been questioned (*Asher* v. *Whitlock* (1865), L. R. 1 Q. B. 1; Dart's Vendors and Purchasers, 7th ed., 475; Pollock & Wright on Possession, 99), and so far as it deals with the general doctrine of possession is probably incorrect. It follows from *Doe* v. *Barnard* (*supra*), that, at any rate when the statute has run against the true owner, the legal title is in the first of the adverse possessors and those claiming through him; and *Asher* v. *Whitlock* and *Perry* v. *Clissold* (*supra*) recognize that, even while the statute is running, the first possessor has a title upon which he can recover against a subsequent disseisor or trespasser. Each possessor, whether under the old law he would have been a disseisor or not, gains at once a possessory title which is good against a subsequent possessor.

Inchoate possessory title.

The nature of an inchoate possessory title may be stated as follows:—If a stranger upon entering claims an existing particular estate in the land, as a life estate, he is seised of that estate (Prest. Abstr. II. 293). If he only claims an existing term, he is possessed of that term (*cf. ibid.*, 295), and his possessory title will devolve as personalty; and it is the same if, without expressly claiming the term, he enters wrongfully during its subsistence, so that the statute runs in his favour against the lessee, but not against the lessor: *supra*, p. 119. But otherwise, since he cannot qualify his own wrong (Co. Litt. 271 a), he gains an estate in fee, and he has an interest which he can alienate or devise, and which, if not devised, will descend to his heir-at-law: *Asher* v. *Whitlock* (1865), L. R. 1 Q. B. 1; *Clarke* v. *Clarke* (1868), Ir. R. 2 C. L. 395; *Doe* v. *Jauncey* (1837), 8 C. & P. 99. This will be so whether he is strictly a disseisor or not, inasmuch as a possession in favour of which the statute is running is now equivalent, for the purpose of founding a possessory title, to adverse possession or tortious seisin under the law prior to the R. P. L. A., 1833. And the possessory title thus gained is good against all subsequent possessors without title. Thus, suppose A. to be the true owner, and B., C., D., and E. to be successive possessors in whose favour the statute runs—either as disseisors, or trespassers, or tenants at will or on sufferance. If E. is in possession at the time when A.'s title is extinguished by the statute, he does not gain thereby a right

to retain the land against the preceding possessors. The title vests first in B., and, when he is barred, it vests successively in C. and D. Only when the statute has barred all these, does E. gain an indefeasible title to the land: *Dalton* v. *Fitzgerald*, [1897] 2 Ch. pp. 90, 91, C. A.

(3) *Title by Receipt of Rent.*

Estoppel by payment of rent.

When a stranger, B., has been in receipt of the rents of land so that the statute is running, or has run, against the true owner, A. (*supra*, p. 111), the question arises whether B. is entitled, as against the tenant, to continue to receive the rents. Where B. has himself let the tenant into possession, the defect in his title is immaterial, since the tenant is then absolutely estopped from disputing it: *Doe* v. *Smythe* (1815), 4 M. & S. 347; *Delaney* v. *Fox* (1857), 2 C. B. N. S. p. 774; *Cook* v. *Whellock* (1890), 24 Q. B. D. 658, C. A.; notes to *Veale* v. *Warner*, 1 Wms. Saund. 580, and to *Walter* v. *Waterhouse*, 2 *ibid.*, 826.

When payment is no estoppel.

But if the tenancy was created by A. or his predecessor in title, then the receipt of rent by B. in the course of the tenancy does not raise an absolute estoppel against the tenant. He may dispute B.'s title if he can show that he was induced to pay rent to him by fraud or misrepresentation: *Doe* v. *Wiggins* (1843), 4 Q. B. 367; *Carlton* v. *Bowcock* (1884), 51 L. T. 659; *Williams* v. *Bartholomew* (1798), 1 B. & P. 327; *Doe* v. *Brown* (1837), 7 A. & E. 447. And he may show that he has paid rent to B. under a mistake, and that B. is not, in fact, entitled to receive it: *Rogers* v. *Pitcher* (1815), 6 Taunt. 202; *Fenner* v. *Duplock* (1824), 2 Bing. 10; *Gregory* v. *Doidge* (1826), 3 Bing. 474; *Cornish* v. *Searell* (1828), 8 B. & C. 471; *Jew* v. *Wood* (1841), Cr. & Ph. 185; *Claridge* v. *Mackenzie* (1842), 4 Man. & Gr. 143; provided he can prove that the true title is in another: *Cooper* v. *Blandy* (1834), 1 Bing. N. C. 45. But in the absence of such proof B.'s *primâ facie* title, evidenced by receipt of rent, will prevail. "No case," said Cave, J., in *Carlton* v. *Bowcock* (1884), 51 L. T. 659, "is to be found in which the tenant has been allowed to pick holes in the title of the person to whom he had paid rent."

Carlton v. *Bowcock.*

In *Carlton* v. *Bowcock* Watson, who was seised in fee of a house and shop, let them, in 1869, to the defendants for a term of five years at £75 a year. In 1872 Watson died, having by

his will devised the property to the plaintiff, whom he also appointed his executor. During Watson's life certain agents had been employed by him to collect the rents of this and other property. They continued to do so after his death, and from 1872 to 1874 they accounted for the rents to the plaintiff. In 1874 the plaintiff endeavoured to sell some freehold property devised to him by Watson, and upon the investigation of the title the objection was taken that the will had not been properly executed. Thereupon the agents ceased to account any longer to the plaintiff. Certain rents already received they retained, and they made no further demand on the tenants. No other person claimed the rent from the tenants, and in fact they did not pay any at all. Ultimately the action was brought to recover from the tenants six years' arrears, and Cave, J., held that the plaintiff was entitled to succeed. "Where," he said, "rent is paid by the tenant under such circumstances as to amount to *primâ facie* evidence of title, the person receiving the rent is in as good a position as if he were actually in possession; and, although it is open to the tenant to prove, if he can, that he paid the rent in ignorance of the true state of the title, and that some third person is the real assignee of the reversion, yet he must show such a title in that third person as would entitle him to a verdict in ejectment, and it is not enough to show that the person to whom the rent was paid has no title, his receipt of the rent being sufficient until a better title is shown."

(4) *Limited Estate under Possessory Title.*

Limited estates by estoppel.

The rule that a person in possession in whose favour the statute is running acquires an estate in fee is sometimes qualified by an application of the doctrine of estoppel. Thus, where a testator, who is in possession of land, but who has no devisable interest, or has merely an inchoate possessory title under the statute, devises it to one for life, with remainders over, and the tenant for life enters, his possession will be referred to his title under the will; and, having entered by virtue of the will, he and persons claiming under him will not be allowed to dispute the right of the remaindermen under the will. In other words, the will takes effect upon the possessory interest, and this interest is carved out into estates corresponding to the limitations of the will. The title of the true owner, of course,

remains until extinguished by the statute. But the rights of the devisees *inter se* are regulated by the will.

Board v. *Board.*

This doctrine was established by *Board* v. *Board* (1873), L. R. 9 Q. B. 48. Robert Amesbury, being tenant by the curtesy of premises of which his deceased wife Hannah had been seised in fee, devised them to trustees for his daughter Rebecca for life, with remainder to his grandson William. On the death of the testator Rebecca entered into possession, and was suffered by Hannah's heir-at-law to remain in possession undisturbed for more than twenty years. William conveyed his remainder to the plaintiff. Rebecca, after the twenty years had elapsed, conveyed to the defendant in fee, and upon her death he took possession. The plaintiff, as assignee of William, brought ejectment, and it was held that the defendant was estopped from disputing his title. "The question is," said Blackburn, J., "whether Rebecca, having taken under the will which gave her an estate for life, is not estopped from saying that, as against William or the person claiming under him, the will, under which she came in as tenant for life and William was remainderman, is void . . . and that the heir-at-law is entitled to the land, and as twenty years have run against his title he is barred, and she, having acquired the fee by twenty years' undisturbed possession, can prevent William from taking under the will. Rebecca claimed under the will, and retained possession under the will, and she, as against everybody interested in the will, is estopped from denying its validity. The case is like that of a tenant coming in under a landlord; and he is estopped from denying his landlord's title": see *Hawksbee* v. *Hawksbee* (1853), 11 Hare, 230.

Entry under settlement. *Dalton* v. *Fitzgerald.*

And the principle applies where lands to which a settlor has no title are included in a settlement, and a limited owner under the settlement enters into possession. In *Dalton* v. *Fitzgerald*, [1897] 2 Ch. 86, C. A., John Dalton, who died in 1837 possessed of the Thurnam and Bulk estates, made a devise which comprised the Thurnam estate, but not—so it was contended—the Bulk estate, to trustees upon trust to settle the devised lands in a specified manner. The trustees by deed dated in 1842 settled both estates upon the trusts mentioned in the will, and successive tenants for life entered under the settlement, the last being Sir Gerald Fitzgerald, who was in possession from 1867 to 1894. Sir Gerald devised the Bulk estate to the defendants, and, upon

the assumption that it was not included in the devise in the will of John Dalton, they claimed that Sir Gerald had acquired a title to the fee. The plaintiff claimed as remainderman under the settlement, and it was held, upon the principle of *Board* v. *Board* (*supra*), that he was entitled to succeed. The doctrine of that case, said Rigby, L.J., was not peculiar to the law of wills, and depended only upon an estate being taken under an instrument, whatever it might be. Even though the Bulk estate was not devised by the will, yet it was comprised in the settlement, and it was under the latter instrument that Sir Gerald Fitzgerald entered. Hence his devisees were estopped from claiming that he had more than a life estate.

No estoppel by an entry under inoperative will.

But there is no such estoppel in a case where land of a testator is not in fact devised by the will, but a tenant for life named as such in the will enters upon the assumption that there has been an effectual devise. A doubt as to this distinction was suggested by Lindley, L.J., in *Dalton* v. *Fitzgerald*, [1897] 2 Ch. p. 91, and a decision against it was given in *Kernaghan* v. *M'Nally* (1861), 12 Ir. Ch. R. 89 (*infra*, p. 130), but it must at present be taken to be established by authority.

Paine v. *Jones.*

In *Paine* v. *Jones* (1874), 20 Eq. 320, a testator, who died in 1830, by his will dated in 1824 devised all his real estate upon trusts under which his widow was tenant for life. He acquired land after the date of his will. The widow entered into possession of this land in the belief that she was entitled under the will and continued in possession for more than twenty years. Malins, V.C., held that her assignee was entitled after her death to keep the land as against the remainderman under the will. She had in fact no title under the will, and her assignee was not estopped from setting up her possession as giving her a title to the fee.

Re Stringer's Estate.

In *Stringer* v. *Jones* (1877), 6 C. D. 1, a testator devised his real estate to his brother J., with power to sell and dispose of it; but in case he should not dispose of it, he devised it to J. H. for life, with remainder to the predecessor in title of the plaintiff. J. died in the testator's lifetime. On the testator's death in 1803, J. H. entered, claiming as tenant for life under the will, and continued in possession till his death in 1869. He devised his real estate to the defendants. It was held by Jessel, M.R., that the gift to J. was an absolute gift, and that the gifts over were void. Thus on the death of J. his heir-at-law was

entitled, but his title had been extinguished by the adverse possession of J. H.; and since J. H. had no title under the will, he was not restricted to the life estate mentioned in the will, but took the fee. In the Court of Appeal a different view was taken of the gift to J., with the result that the remainders were held to be valid. Consequently there was no adverse possession by J. H., and the plaintiffs were entitled. Thus the present point was not considered, and the decision of Jessel, M.R., remains as an authority upon it.

Re Anderson.

In *Re Anderson*, [1905] 2 Ch. 70, a married woman, married before 1883, purported to dispose by will of freehold property, over which she had no power of appointment, in favour of her husband for life with remainders over. The husband entered and held the property from 1882 until his death in 1903. It was held by Buckley, J., that he had acquired the fee and that it passed under a devise of real estate in his will. He took nothing under the devise in his wife's will, and consequently those claiming under him were not estopped from setting up their possessory title against the remaindermen under that will.

Contrary view in *Kernaghan* v. *M'Nally.*

In *Kernaghan* v. *M'Nally* (1861), 12 Ir. Ch. R. 89, on the other hand, it was decided by Brady, L.C., that the estoppel applied although the will did not pass any interest at all in the lands. *Cestui que trusts* entitled in common in fee under a will made in 1776 entered upon land which the testator had acquired after that date. It was held that they were bound to refer their possession to the will, and, since they were to be deemed to hold as tenants at will to the trustees, the effect was to vest in the trustees the legal estate which had been acquired by possession as against the heir. And the view that a possession taken upon the footing of a will being valid must be referred to the will seems to be supported by the dictum of Martin, B., in *Anstee* v. *Nelms* (1856), 1 H. & N. 225. "My impression is that the Statute of Limitations can never be so construed that a person claiming a life estate under a will shall enter, and then say that such possession was unlawful, so as to give to his heir a right against the remainderman." In that case, however, the land in question passed under the will; and the point now in question had not to be determined. And it is to be noticed that *Kernaghan* v. *M'Nally*—apart from its being opposed to the subsequent English authorities—is inconsistent with the prior decision of Sugden, L.C., on the same will in *Scott* v. *Nixon* (1843), 3 Dr.

& War. 388, that the legal estate had vested in the *cestui que trusts* by virtue of their possession: *cf. Dalton* v. *Fitzgerald*, [1897] 2 Ch. pp. 91, 95, C. A.

Operative and inoperative instruments.

It seems correct, therefore, to say that there is an established distinction between the case where a testator, having either no devisable interest or an incomplete possessory title, actually devises the land by his will, and the case where he has a title, whether absolute or only possessory, but does not make an effectual devise. In the former the persons who enter by virtue of the limited estates which the will creates are bound to refer their possession to the will. And so, too, where land to which the settlor has no title is actually comprised in a settlement, and the tenant for life, as in *Dalton* v. *Fitzgerald*, is thereby placed in possession of it. In such cases the instrument which creates the life estate is really operative on the particular property. It is otherwise where the instrument is altogether inoperative on the property. A person entering on the property then takes no interest therein under the instrument. And though he may be named in the instrument as tenant for life, his possession is independent of the instrument, and he is bound by no estoppel in favour of the remainderman.

(5) *Title to Compensation under the Lands Clauses Act.*

Effect of sale by apparent owner.

The question of the efficacy of a possessory title arises when the compensation for land held under such a title, and taken for the purposes of a public undertaking, is paid into Court under the Lands Clauses Act, 1845. The amount of the compensation is fixed by agreement between the apparent owner and the undertakers, or by the award of an arbitrator, or the verdict of a jury, and if the "owner" fails to make out a title to the satisfaction of the promoters, the amount may be paid into the bank (sect. 76), and thereupon the promoters may execute a deed poll vesting in themselves all the estate and interest in the lands "of the parties for whose use and in respect whereof" such compensation has been deposited (sect. 77). But these sections do not enable the promoters to agree upon the compensation with a claimant who has no title, and then vest the land in themselves. They refer to cases where an owner has a title to the fee, but by reason of outstanding interests—such as dower or jointure—in a third party, he is not able to convey an

unincumbered estate: *Douglas* v. *London & North-Western Ry. Co.* (1857), 3 K. & J. 173; *Wells* v. *Chelmsford Local Board* (1880), 15 C. D. 108. "It is impossible to suppose," said Wood, V.C., in *Douglas* v. *London & North-Western Ry. Co.*, "that the Legislature could ever have contemplated that a person having a positively bad title, and who is merely in possession of land, should be at liberty by his own agreement to sell that land and to fix the price, adversely to another who may possibly be in a position to recover in ejectment the very next day." Hence, where the person claiming to be owner does not show a title to the fee, the promoters cannot by paying in the sum he has agreed to take vest the fee in themselves. The effect of the deed poll is to vest in the promoters only the actual interest of the party with whom the contract has been made, and if this is a possessory interest, that is the interest which passes under the deed poll: *Ex parte Winder* (1877), 6 C. D. 696.

Payment of compensation to owner with possessory title.

When the compensation has been deposited in the bank, application for payment out is made under sect. 78, and sect. 79 provides that if any question arise respecting the title to the lands, "the parties respectively in possession of such lands, as being the owners thereof . . . shall be deemed to have been lawfully entitled to such lands, until the contrary be shown to the satisfaction of the Court." The effect is that where the title is possessory, but more than twelve years of possession have elapsed before it is taken by the promoters, and there are no reasons for supposing that a longer period is required to perfect the title on account of the disability of the true owner, or the existence of future interests, the claimant is entitled to be treated as owner and to have the money paid out to him at once: *Re Alston's Estate* (1856), 5 W. R. 189; *Ex parte Webster*, W. N. (1866), p. 246. And a similar result has been arrived at when a person entitled under a lease has held over after the termination of the lease for more than the statutory period: *Ex parte Chamberlain* (1880), 14 C. D. 323; *Ex parte Forde*, [1894] 1 I. R. 156; though this has been questioned upon the ground that such a person does not hold as "owner": *Gedye* v. *Commissioners of Works*, [1891] 2 Ch. 630.

Possessory title not complete.

Where the statutory period has not elapsed before the land is taken, the land should be valued as at the date of taking: *Perry* v. *Clissold*, [1907] A. C. 73 (*supra*, p. 123); and the money

will remain in Court until that period has elapsed without claim by the true owner, and also any further period which under the circumstances may be proper in order to insure that no other claim can be successfully made: *Ex parte Winder* (1877), 6 C. D. 696; *Re Evans* (1873), 42 L. J. Ch. 357; *Re Harris*, [1901] 1 Ch. 931; *Ex parte Breach* (1864), 12 W. R. 769.

Land taken before possessory title has commenced.

Where, however, at the time when the promoters take the land, the occupier's title is still lawful, as where he is a lessee holding near the end of a long lease, he cannot claim more than the actual value of his interest, notwithstanding the fact that the reversioner is unknown, and that, had the promoters not intervened, the occupier would probably have been able to gain a possessory title: *Gedye* v. *Commissioners of Works*, [1891] 2 Ch. 630. There is, in such a case, no inchoate interest which, if left undisturbed, will ripen into possession.

(6) *Effect of Registration of Title on the Acquisition of Title by Adverse Possession.*

Adverse possessory titles formerly excluded by Land Transfer Act, 1875.

Under the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), an adverse possession taken after the registration of land, whether with an absolute or a possessory title, did not affect the title of the registered proprietor; and it was the same with an adverse possession taken before the registration of land with an absolute title. But where, at the date of registration of land with a possessory title, the statute was already running against the applicant for registration, it continued to run against him after registration, and a title adverse to the registered title could be acquired: Land Transfer Act, 1875, sect. 21.

Adverse titles allowed under Land Transfer Act, 1897.

Under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), this scheme is fundamentally altered; partly by virtue of the inclusion of adverse possessory titles among the interests enumerated in sect. 18 of the Act of 1875, and thereby declared not to be "incumbrances"; partly by virtue of the re-enactment of sect. 21 of the Act of 1875 as sect. 12 of the Act of 1897 with the addition of a proviso allowing for the rectification of the register in favour of a possessor who has acquired a title by adverse possession.

Rules as to adverse possession.

Under the two Acts together the present rules as to adverse possession are as follows:—

(1) All registered titles, whether absolute or possessory, are liable to be displaced by adverse interests acquired by possession; but these interests, save as mentioned under (4), cannot be made effective without rectification of the register.

(2) If, while the statute is running in favour of an adverse possessor, there is a registered transfer of the land for value, the statute is stopped, and thereupon it begins to run afresh against the transferee.

(3) Any person who has acquired a title by adverse possession can obtain a rectification of the register in his favour.

(4) As against a first registered proprietor with a possessory title, and, probably, as against transferees from him, whether for value or not, an adverse title arising from a possession commenced before the date of registration is, when complete, effective without rectification of the register.

Deduction of the rules from the Land Transfer Acts.

These rules are not stated explicitly in the Acts, but they follow from a consideration of the relevant provisions. Sect. 18 of the Act of 1875 enumerates various liabilities, rights, and interests to which all registered land, unless the contrary is expressed on the register, is to be deemed to be subject, and which are not to be deemed "incumbrances" within the meaning of the Act; and Schedule I. to the Act of 1897 extends the list by the addition of the following item :—"Subject to the provisions of this Act, rights acquired or in course of being acquired under the Limitation Acts." The phrase "subject to the provisions of this Act" refers to sect. 12 of the Act of 1897, and in cases where registered titles are, by this addition to sect. 18, *primâ facie* made subject to adverse possessory interests, it must be remembered that this result follows only so far as, and in the manner permitted by, sect. 12. The importance of the definition of adverse possessory interests as not being "incumbrances" lies in the fact that the estate vested in a first registered proprietor, whether absolute or possessory, and also the estate vested in a registered transferee, whether for valuable consideration or not, is subject "to such liabilities, rights, and interests, if any, as are by this Act declared not to be incumbrances" (see Act of 1875, sects. 7, 8, 30, 32, 33). Consequently it is subject to such adverse possessory interests as for the time being have been acquired, or are in course of being acquired.

Registered title is subject to adverse possessory interests.

How adverse possessory titles are made effective.

But this result is subject to sect. 12 of the Act of 1897, and the question remains how far the acquisition of an adverse possessory title is affected by that section, which is as follows:—

Land Transfer Act, 1897, s. 12.

Title to registered land by possession.

"A title to registered land adverse to or in derogation of the title of the registered proprietor shall not be acquired by any length of possession [and the registered proprietor may at any time make an entry or bring an action to recover possession of the land accordingly. Provided that where a person would, but for the provisions of the principal Act or of this section, have obtained a title by possession to registered land, he may apply for an order for rectification of the register under sect. 95 of the principal Act, and on such application the Court may, subject to any estates or rights acquired for valuable consideration in pursuance of the principal Act or this Act, order the register to be rectified accordingly].

"And provided also that this section shall not prejudice, as against any person registered as first proprietor of land with a possessory title only, any adverse claim in respect of length of possession of any other person who was in possession of such land at the time when the registration of such first proprietor took place."

Rectification of the register as against registered proprietor.

This section re-enacts, with the addition of the part in square brackets, sect. 21 of the Land Transfer Act, 1875, which is repealed. In the absence of any provision exclusive of the Statute of Limitations, a system of registration does not operate to prevent the registered title being extinguished by adverse possession: *Belize Estate Company* v. *Quilter*, [1897] A. C. 367, P. C. But the above section enunciates the general rule that a title adverse to that of the registered proprietor shall not be acquired by possession, and this taken by itself would override the provisions above mentioned in favour of adverse possessory titles. The general rule, however, is qualified by two provisoes, the first referring to registered titles generally, the second to registered possessory titles against which the statute was already running at the date of first registration.

The effect of the first proviso is to save adverse possessory titles as against registered titles generally, but to require that, as a condition of their being effective, the adverse owner shall procure the register to be rectified in his favour. The registered title is predominant so long as it remains on the register, but, upon the adverse title becoming complete under the R. P. L. Acts, the adverse owner is entitled to have his name substituted

on the register as proprietor. His adverse title is expressly recognized by the sections of the Land Transfer Act, 1875, already referred to, when read in connection with the extension given to sect. 18 by Schedule I. to the Act of 1897, the recognition, however, being subject to sect. 12 of the latter Act. This qualification is satisfied by requiring that the adverse title shall not be enforceable until it has been registered, but the right to registration is clearly conferred. In other words, the adverse possessory title is effective as regards the registered land upon condition that the possessory owner shall establish his adverse title to the satisfaction of the Court, and shall procure the register to be rectified.

Rectification as against registered transferee for value.

The adverse owner's right to rectification is, however, "subject to any estates or rights acquired by registration for valuable consideration": sect. 12 (*supra*). Hence a purchaser from the registered proprietor is under no necessity to inquire into the state of the possession at the time of his purchase. If he procures himself to be registered it makes no difference that the statute is then running or has then run against his vendor. He takes what is, for the purpose of the statute, a new title; but, if the adverse possession continues, the registered title is, as before, subject to it. The statute again commences to run, and if the transferee suffers twelve years to elapse without entry or action, the register can then be rectified against him. Thus if in 1908 B. dispossesses A., the registered proprietor, who is absolutely entitled and is under no disability, and A. does nothing for twelve years, at the end of that time—in 1920—B. will have acquired a title and can call for rectification of the register. But if, in 1919, A. sells to C., and C. procures himself to be registered, but does not enter, the statutory period begins to run afresh against C., and he will not be barred till 1931.

Adverse Possession at Date of Registration of Possessory Title.

Statute running at date of registration with possessory title.

The general rule of sect. 12 securing the predominance of the registered title makes no distinction between possessory and absolute titles, and, as regards an adverse possession begun after first registration, there is no reason for any difference. As to matters originating after first registration the register is as conclusive in the case of a possessory title as in the case of an

absolute title. But a title registered as possessory gives no guarantee as to the state of the title prior to registration. Under the Land Transfer Rules, 1903, r. 18, it did not even ensure that the registered proprietor was at the date of registration in possession: see *Marshall* v. *Robertson* (1905), 50 Sol. Journ. 75. This qualification of a registered possessory title follows from sect. 8 of the Act of 1875, which enacts that the registration "shall not affect or prejudice the enforcement of any estate, right, or interest adverse to or in derogation of the title of such first registered proprietor, and subsisting or capable of arising at the time of registration of such proprietor." A title based upon a possession held adversely to the registered proprietor at the date of registration is an estate adverse to his title, which was "subsisting or capable of arising" at the time of registration within the meaning of sect. 8. Hence it prevails over the registered title, and under sects. 32 and 33 its prevalence continues as against a registered transferee, whether for value or not.

Proviso saving prior adverse possession as against first registered possessory proprietor.

This liability of a registered possessory title to be set aside in favour of an adverse possession existing prior to registration is so emphatically an incident of the registered title that, even apart from the second proviso to sect. 12 of the Act of 1897, the liability would not, it is apprehended, be affected by the main provision of that section excluding the Statute of Limitations. The general enactment that a title adverse to the registered proprietor shall not be acquired by possession could not be construed as overruling the provision in favour of a prior possession in the case of registered possessory titles. To make this clear, however, the second proviso was introduced, and as against the first registered proprietor the case was put outside sect. 12 altogether. As against such proprietor, therefore, the statute, if it has commenced to run, continues to run, and the adverse title when complete is effective as against the registered title, and this is so without any rectification of the register.

Position of transferee from the first registered proprietor.

But the second proviso to sect. 12 operates, according to its terms, only as against the first registered proprietor with a possessory title. What happens to the adverse possessory title, if a change takes place on the register, and a transferee, whether for value or not, is registered as proprietor? It would seem that no reliance can now be placed on the proviso. The

expression "person registered as first proprietor" is not apt to describe any other than the first person named as proprietor on the register. It does not properly include a transferee, nor even an executor or devisee. Such persons are not first proprietors; though, having regard to the scheme of the Acts, it might have been expected that the proviso would be extended to persons claiming under the first proprietor, and the words might possibly admit of this construction. But this is very doubtful, and the following is suggested as the correct way of dealing with the matter:—

As already pointed out, the proviso is not really required for the purpose of preserving claims arising out of an adverse possession already existing at the date of first registration. These are preserved both as against the first proprietor and transferees from him by the sections which define the nature of the possessory registered title in his and their hands; and claims thus expressly reserved are not taken away by the general provision of sect. 12. The second proviso fortifies this result as regards the first registered proprietor, but the fact that the proviso is limited in its effect to him does not prevent the adverse owner from relying on sects. 32 and 33 of the Act of 1875 as against transferees. This, it is submitted, is the correct view, and the adverse estate arising out of a possession prior to first registration prevails as against registered transferees whether for value or not, without any need for rectification of the register; though of course rectification would be advisable, and, if applied for, would be ordered by the Court.

If, however, the restriction of the proviso to the first registered proprietor is held to be an intimation that the setting up of the statute as against transferees from him is, notwithstanding the express language of sects. 32 and 33 of the Act of 1875, subject to sect. 12, then it can be set up only in manner specified in the first proviso. The statute continues to run against voluntary transferees notwithstanding the transfer; as against transferees for value it is stopped and begins to run afresh from the transfer; but in either case the register must be rectified before the adverse possessory title can be made available.

Extinguishment of Equity of Redemption.

Owner of registered charge in possession.

Where the proprietor of a registered charge goes into possession, the equity of redemption will be extinguished and he will be entitled to be placed on the register as proprietor at the end of twelve years, provided that there has not been a registered transfer for value. In that case it would seem that the twelve years must be reckoned again from the date of the transfer: *cf.* Brickdale and Sheldon's Land Transfer Acts, 2nd ed. pp. 327, 328.

Section X.—Crown Lands.

Sixty years a bar to the Crown.

Prior to the statute 21 Jac. 1, c. 2, there was no limitation on proceedings by the Crown to recover land, the maxim of the common law being "*nullum tempus occurrit regi*" (Litt. s. 178). According to Lord Coke (3 Inst. 188) this led to great abuses, it being the practice of indigent persons to search out and obtain grants of ancient Crown titles and then set them up against persons who had been in long enjoyment of the lands, and who had lost the means of establishing their own title under the Crown. The statute 21 Jac. 1, c. 2, imposed a limitation of 60 years on suits by the Crown to recover manors, lands, and hereditaments (other than liberties and franchises). But inasmuch as the 60 years was reckoned before the commencement of the then session of Parliament—namely, 19th February, 1624—the statute in course of time lost its effect. Accordingly by the Crown Suits Act, 1769 (9 Geo. 3, c. 16), usually known as the Nullum Tempus Act, the modern method of limitation was adopted, and the period of 60 years was reckoned prior to the commencement of the proceedings to recover the land.

(1) *Possession against the Crown.*

Possession by Crown.

The possession of the Crown is said to be of two sorts, in law and in deed: in law, merely by force of law; in deed, by actual taking by an officer, though without office found (Chitty, Prerog. of Cr. 251). Also, where the possession is vacant, the effect of office found is said to be to vest the possession in deed in the Crown, or (prior to the Forfeiture Act, 1870) even without office found, in case of treason: *Doe* v. *Redfern* (1810), 12 East, p. 114. In such a case a possession which is really only possession in law is treated, in favour of the Crown, as though it were actual possession. And where the Crown is once in possession by title of record, the possession continues, in theory, until the record is changed, and it is said that the Crown is not put out of possession or disseised by the wrongful entry of a subject: *Lee* v. *Norris* (1597), Cro. Eliz. 331; *Doe* v.

Morris (1835), 2 Bing. N. C. p. 196; *Tuthill* v. *Rogers* (1844), 1 Jo. & Lat. p. 67.

Effect of fictitious possession by Crown.

If possession once held by the Crown remained in the Crown notwithstanding the actual occupation of another, this would mean that the occupier could not maintain trespass: see *Harper* v. *Charlesworth* (1825), 4 B. & C. 574 (where, however, the Court declined to deprive of this remedy one who had entered by the permission of the Crown); and an occupier without title, if ejected by a wrongdoer, would not be able to recover possession. The continued seisin of the Crown would rebut the presumption of seisin in fee in the occupier: *Goodtitle* v. *Baldwin* (1809), 11 East, 488. And if, as it now seems correct to say (*supra*, p. 124), possession is a sufficient title in ejectment, he would just as little be able to recover on his actual possession.

Possession may be adverse to Crown.

But the theory that possession remains in the Crown in spite of the occupation by a stranger applies only to a limited extent. It may be that for the purpose of certain remedies the Crown is assumed to remain in possession; as for bringing an information of intrusion, which is in the nature of trespass; or for asserting the right to require trespassers to account as bailiffs to the Crown. But in general a possession can be gained against the Crown just as against an individual. Where the possession of a stranger has continued for upwards of sixty years, the effect is to extinguish the estate of the Crown and to vest the seisin in fee in the possessor: *Att.-Gen.* v. *Hotham* (1823), Turn. & Russ. p. 218; *Tuthill* v. *Rogers* (1844), 1 Jo. & Lat. p. 67; *infra*, p 147; and, before that period has elapsed, it is clear that under the Nullum Tempus Act there may be a possession adverse to the Crown in point of fact: *Doe* v. *Morris* (*supra*). As to the circumstances which will establish such a possession see *Att.-Gen. for British Honduras* v. *Bristowe* (1880), 6 App. Cas. 143, P. C. Where an entire manor or other district has been in charge to the Crown within sixty years, acts done on different parts of the land by different persons for the purpose of finding and burning limestone, and disposing of the lime, do not necessarily amount to such adverse possession as to displace the title of the Crown, although they may have been continued for more than sixty years: *Doe* v. *Roberts* (1844), 13 M. & W. 520.

Presumption of grant.

Although no title has been gained against the Crown under the statute, the same effect may sometimes be produced by allowing long possession to raise a presumption of a grant from

the Crown; but for this purpose it is essential that the Crown shall not be restrained from alienation, so that a grant is possible: *Goodtitle* v. *Baldwin* (1809), 11 East, p. 488; *Doe* v. *Wilson* (1855), 10 Moo. P. C. p. 527; *cf. Mills* v. *Commissioners of New Forest* (1856), 18 C. B. 60; and as to presumption of enfranchisement, see *Roe* v. *Ireland* (1809), 11 East, 280 (*supra*, p. 94).

Pleading by possessor.

At common law, where the Crown sued for possession of lands, the possessor could not, as in ordinary actions of the same nature, rely upon his possession, but was bound to plead his title specially (Com. Dig. "Prærogative," D. 74). This was put upon the ground that the king's title was of record, and therefore the defendant had notice of it: 4 Inst. 116; *Att.-Gen.* v. *Hallett* (1847), 1 Ex. p. 213. And the rule still holds where the Crown has been out of possession for less than twenty years. But where the Crown has been out of possession for more than that period, the possessor is allowed by 21 Jac. 1, c. 14, to plead the general issue and need not plead specially, and he then retains possession until judgment has been given for the Crown: *cf. Att.-Gen.* v. *St. Aubyn* (1811), Whitw. p. 236. In other words, twenty years' adverse possession gives a *primâ facie* title against the Crown, and the burden is thrown on the Crown to prove its title in the first instance. This proof may be given at the hearing of the information, and the title need not first be found by inquest of office: *Att.-Gen.* v. *Parsons* (1836), 2 M. & W. 23.

Pleading the general issue.

The possessor cannot be deprived of his statutory right to plead the general issue by a mere allegation on the part of the Crown of possession by the Crown within twenty years: *Att.-Gen.* v. *Mitchell* (1832), Hayes, 551. If there is a dispute as to this fact, it must be determined at the trial, and the plea of the general issue cannot be set aside on affidavit of possession by the Crown: *Att.-Gen.* v. *D'Arcy* (1830), Hayes, 85. On the other hand, the possessor pleads the general issue at his own risk; and if it is shown that the Crown has been in possession within twenty years, judgment necessarily goes for the Crown inasmuch as the possessor has now no *primâ facie* title, and has alleged no special title: *Att.-Gen.* v. *Ward* (1832), Hayes, 555.

Irish statutes.

The Statute of Limitation, 21 Jac. 1, c. 2, was never enacted for Ireland; but the pleading statute (21 Jac. 1, c. 14) was adopted for that country by 15 Car. 1, c. 1. Some years after the Nullum Tempus Act had been passed for England, a

corresponding statute was passed for Ireland—48 Geo. 3, c. 47. This, however, differed in certain respects from the English Act, and it omitted some of the provisions of that Act which had been needlessly reproduced from 21 Jac. 1, c. 2.

(2) *The Nullum Tempus Acts.*

(i.) *Present Interests in the Crown.*

The Nullum Tempus Acts.

The English and Irish Nullum Tempus Acts are so verbose that it will be better to present them here in an abridged form. The full text will be found in the Appendix. By omitting unnecessary words, and using the phrase "land and hereditaments" instead of "manors, lands, rents, tithes, or hereditaments," and "rents and profits" instead of "rents, revenues, issues, or profits," the whole effect can be presented shortly and without any sacrifice of meaning. The Acts only refer to proprietary rights of the Crown, such as in the case of an individual would be personal and beneficial. They do not touch the enforcement of rights as regards which the Crown is invested with a public duty, such as charities: *Att.-Gen.* v. *Magdalen College* (1854), 18 Beav. p. 241.

(A) *Limitation of Action.*

Limitation on claim by Crown.

The following is the negative or limiting clause of the Nullum Tempus Act (9 Geo. 3, c. 16); it is followed by a positive clause, definitely establishing the title of the subject who has been in possession for the prescribed period:—

English Nullum Tempus Act, s. 1, clause 1.

Sixty years' limitation.

> "The Crown shall not sue any person for or in any wise concerning any lands or hereditaments (other than liberties or franchises), or the rents and profits thereof, by reason of any right or title which has not first accrued within sixty years next before the commencement of the suit, unless the Crown or its predecessors n title have been answered by force of any such right or title the rents or profits thereof [*or the rents or profits of any honour, manor, or other hereditament whereof the premises in question are part*] within the said space of sixty years [*or that the same have been duly in charge to the Crown or have stood insuper of record within such space*]."

Effect of the clause.

The parts in italics were, save as to rent-charges withheld by the terre-tenant, repealed by the Crown Suits Act, 1861 (*infra*, p. 144). Prior to such repeal the statutory period was excluded

if the Crown could bring itself within any one of three exceptions, namely:—

(1) Receipt of rents and profits of the land or of an honour, manor, or hereditament of which the land was part;

(2) That the rents and profits had been duly in charge to the Crown; or

(3) That the "rents and profits" had stood *insuper* of record.

"Duly in charge" originally meant that the rents and profits were entered in the roll of the pipe: 3 Inst. 189; see *Re Maxwell's Estate* (1891), 28 L. R. Ir. 356, at p. 362; but, under sect. 2 of the Nullum Tempus Act, it was sufficient that they were in charge with any proper officer of the revenue. And if any particular subject-matter was returned by the officers in the Crown revenue accounts, this was sufficient proof of its having been kept in charge to exclude the statute, although they also returned "nil," and the claim had not been put in suit for over sixty years: *Att.-Gen.* v. *Maxwell* (1814), 8 Pr. 76, note; *Att.-Gen.* v. *Eardley* (1820), 8 Pr. 39; *cf. Tuthill* v. *Rogers* (1844), 1 Jo. & Lat. p. 82; *Att.-Gen. for New South Wales* v. *Love*, [1898] A. C. p. 686, P. C. This travesty of the doctrine of adverse possession was abolished by the Crown Suits Act, 1861 (24 & 25 Vict. c. 62), which also deprived the Crown of the right to exclude the statute by receipt merely of the rents and profits of an honour or manor of which the land in question formed part. To be effectual the receipt must now be actual receipt of the rents and profits of the particular land. The provisions of this Act, simplified as in the above statement of the Nullum Tempus Act, are as follows:—

Crown Suits Act, 1861, s. 1.

No saving where rents only in charge to Crown.

"The Crown shall not sue any person for or in any wise concerning any lands or hereditaments (other than liberties or franchises) which such person or his predecessors in title have held or of which they have taken the rents or profits for the space of sixty years before the commencement of the suit, by reason only that the same lands or hereditaments, or the rents or profits thereof, have been in charge to the Crown, or stood *insuper* of record within the said space of sixty years.

Sect. 3.

"The Crown shall not be deemed, for the purposes of 9 Geo. 3, c. 16, to have been answered the rents or profits of any lands or hereditaments, which shall have been held or enjoyed, or of which the rents or profits shall have been taken, by any other person, for

the space of sixty years next before the commencement of any proceeding for recovering the same or in respect thereof, by reason only of the same lands or hereditaments having been part of any honour or manor or other hereditaments of which the rents or profits shall have been answered to the Crown or its predecessors in title."

No saving where land is part of manor the rents of which are answered to Crown.

Sect. 1 of this Act only applies where lands have been adversely held or the rents and profits adversely taken; it does not extend to the case of the withholding of rent by the terre-tenant. Hence a rent-charge due to the Crown may still, in England, be kept alive by being simply entered in the revenue books, although there is no payment in respect of it: *Re Maxwell's Estate* (1891), 28 L. R. Ir. 356. But apart from such cases, clause 1 of sect. 1 of the Nullum Tempus Act now operates as though the parts enclosed in brackets in the above summary (p. 143) were struck out.

Effect on Nullum Tempus Act.

The provision of the Irish Nullum Tempus Act (Crown Claims Limitation (Ireland) Act, 1808 (48 Geo. 3, c. 47)), corresponding to clause 1 of the 1st section of the English Act, is as follows, the actual words being summarized as in the statement of such clause given above:—

Ireland.

"The Crown shall not sue any person for or in any wise concerning any lands or hereditaments (other than liberties or franchises) or the rents and profits thereof by reason of any right or title which has not first accrued within sixty years next before the commencement of the suit, unless the Crown or its predecessors in title have been in the actual seisin thereof, or have been answered by force of any right or title to the same the rents or profits thereof [*or the rents or profits of any honour, manor, or other hereditament whereof the premises in question are part*], within the space of sixty years [*or that the same have been duly in charge to the Crown within such space*].

Irish Nullum Tempus Act, s. 1, cl. 1.

Sixty years' limitation.

The Nullum Tempus (Ireland) Act, 1876 (39 & 40 Vict. c. 37), by sects. 1 and 2, repealed the portions in brackets in terms similar to those of the Crown Suits Act, 1861 (*supra*, p. 144), but the repeal was limited, in the manner already stated, to cases where there had been adverse receipt of rents as distinguished from withholding of rent. In *Re Maxwell's Estate* (1891), 28 L. R. Ir. 356, a quit rent payable to the Crown, and entered in the Crown rental at the time of its creation, had not been paid for over sixty years. It was held, following *Att.-Gen.* v. *Hardley* (1820), 8 Pr. 39, that the rent was "duly in charge"

Nullum Tempus (Ireland) Act, 1876.

within the meaning of sect. 1 of the Irish Nullum Tempus Act, and that the Act of 1878 only applied, in the case of a quit-rent, where the rent had been wrongfully received by a subject for the statutory period. But this has been corrected (though in Ireland only), and the limitation made to apply to the non-payment of a rent, by sect. 9 of the Crown Lands Act, 1906 (6 Ed. 7, c. 28):—

Crown Lands Act, 1906, s. 9.

Limitation on quit-rents in Ireland.

> "No proceedings shall be taken by or on behalf of the Crown for enforcing the payment of any quit-rent or any other perpetual rent payable to the Crown in Ireland or any arrears thereof but within sixty years from the time when such rent was last received by or on behalf of the Crown, and after the expiration of that period the right of the Crown to the rent and arrears shall be extinguished."

Effect of Irish statutes.

The effect of these enactments is that in Ireland the statute is excluded where the Crown has, within the sixty years, been either in the "actual seisin" of the lands, or in receipt of the rents and profits. The meaning of the phrase "actual seisin" was discussed in *Tuthill* v. *Rogers* (1844), 1 Jo. & Lat. 36. The difficulty is that if the Crown has once been seised it cannot technically be disseised (*supra*, p. 140). Blackburne, M.R., who was sitting with Sugden, L.C., took the natural view that actual seisin meant actual possession (p. 67). Lord St. Leonards hesitated to go as far as this, and referred to instances in which a seisin is recognized as actual, even though the person seised has neither entered nor received rent. Thus where one dies seised of land in the possession of a tenant and the land descends to his heir, the heir has at once a seisin in deed: *Bushby* v. *Dixon* (1824), 3 B. & C. 298. He was content to say that in the case before him the Crown could not be deemed to be in the actual seisin of the lands within the meaning of those words. Inasmuch, however, as he attributed this result to the fact that, though the seisin and the right to possession had been in the Crown in 1776, a subject had enjoyed the lands for sixty years by claim of right to the fee without interruption by the Crown, he appears in effect to have assented to the view taken by the Master of the Rolls; and there can be no doubt that where a subject gains adverse possession, the Crown is no longer "in the actual seisin" for the purpose of the statute.

"Actual seisin."

Receipt of rents and profits.

Under both the English and Irish Acts the Crown's title is saved by receipt of the rents and profits, or, to use the fuller

phrase of the statutes, "the rents, revenues, issues, or profits." Such receipt must be in respect of the entire income from the land, and the statute is not excluded by the receipt of a quit-rent. This appears more clearly from sect. 5 (*infra*, p. 150).

(B) *Establishment of Adverse Title.*

The second clause of sect. 1 of the English and Irish Nullum Tempus Acts is as follows:—

Nullum Tempus Act, s. 1, cl. 2. Nullum Tempus (Ireland) Act, s. 1, cl. 2.

> "And all persons, according to their several estates and interests which they have or claim to have in the same respectively, shall at all times quietly hold against the Crown claiming by any title, which has not first accrued within the said space of sixty years, all lands and hereditaments (except liberties and franchises) which they or their predecessors in title have held, or of which they have taken the rents and profits, for sixty years next before the commencement of proceedings by the Crown for recovering the same, unless the Crown or its predecessors in title, by force of any right or title [*for Ireland*, have been in the actual seisin thereof or] have been answered by virtue of any such right or title the rents, or other profits thereof within the said space of sixty years [*or that the same have been duly in charge or stood insuper of record within such space*]."

The concluding words are, in effect, repealed by the Crown Suits Acts, 1861, and the Nullum Tempus (Ireland) Act, 1876 (*supra*, pp. 144, 145).

Pretenced titles.

There follows in the English Act a third clause which, like the first two clauses, was copied from 21 Jac. 1, c. 2, and was intended to secure the possessor who had held adversely to the Crown for sixty years against persons claiming under the Crown under grants of pretenced titles, or, to use Lord Coke's words, "against patentees and grantees of concealments, defective titles, or lands not in charge, and all claiming under them." A beneficial law, he calls it, both for the Church and the Commonwealth, in respect of the multitude of letters patent and grants of these natures and qualities, but it had become obsolete before the date of the English Act, in which it was needlessly introduced. It is not found in the corresponding Irish enactment (48 Geo. 3, c. 47).

Extinguishment of Crown's title.

The first clause of sect. 1 is negative and exclusive of the right and title of the king; the second is affirmative and establishes the estate of the subject (3 Inst. p. 190). In effect,

the second corresponds to sect. 34 of the R. P. L. A., 1833, which extinguishes the title against which the statute has run. "These distinct clauses," said Blackburne, M.R., in *Tuthill* v. *Rogers* (1844), 1 Jo. & Lat. p. 62, "had objects perfectly different. The first was a limitation to the suit, and barred the remedy of the Crown; the second, by confirming for all time thereafter the estate had *or claimed* by the subject, and enjoyed for sixty years, against the Crown's title, barred and extinguished that title and transferred it to the subject;" and see further under sects. 5 to 7 (*infra*, p. 151). And even though the estate (as opposed to a mere right of entry: see *per* Sugden, L.C., in *Tuthill* v. *Rogers* (1844), 1 Jo. & Lat. p. 82) remains in the Crown, yet the statute runs if one claiming an interest in the land actually takes the rents and profits; "for albeit the king may in law charge him as bailiff, yet without question, *de facto*, he did take the rents, revenues, issues, and profits, and that sufficeth to answer the letter and meaning of this Act": 3 Inst. 190. But the estate of the adverse possessor is established only against the Crown, and the Act does not bar any right which a subject—as mortgagee, for instance—may have against the possessor (*ibid.*). But when all claims, as well of the Crown as of individuals, are extinguished, the title is good and will be forced on a purchaser (*supra*, p. 118).

(ii.) *Future Estates in the Crown.*

Future estates in Crown.

Under clause 1 of the Nullum Tempus Act, sect. 1, a sixty years' possession does not bar the Crown if the right or title of the Crown has accrued within that period. "Right or title" refers to right or title to possession, and hence in strictness it was unnecessary to make any provision for future estates vested in the Crown. The right does not accrue, and the statute does not run, till the future estate falls into possession. The matter, however, was not left to be dealt with on this simple footing, and the case of future estates is specially dealt with by sects. 3 and 4, while the particular case of a reversion upon a Crown lease is governed by sect. 4 of the Crown Suits Act, 1861. The following is the effect of these sections:—

Nullum Tempus Act, s. 3.

"This Act shall not bar King George III. or his successors from any lands or hereditaments whereof any reversion or remainder now is in him, for or concerning such reversion or remainder;

"Nor from any reversion or remainder, or possibility of reversion or remainder in any of his predecessors, which by the determination of any limited estate of fee-simple, or of any fee-tail or other particular estate, has first fallen into possession within the space of sixty years next before the commencement of proceedings for recovering the same, or in respect thereof; Reversions in the Crown.

"Nor from any right or title first accrued to the Crown in or to any lands or hereditaments within such space of sixty years.

"This Act shall not extend to any lands or hereditaments mentioned to be granted by any predecessors of King George III. to any person for any limited estate in fee-simple, or for any estate tail or other particular estate, which several estates (if the same had been effectual) would have first fallen into possession within the space of sixty years next before the commencement of proceedings for recovering the same, or in respect thereof; nor to any lands or hereditaments mentioned to be granted by any predecessors of King George III. to any person in fee-tail or other particular estate, whereof the reversion or inheritance (if such estate tail or other particular estate had been effectual) would have continued in the Crown within the space of sixty years next before the commencement of proceedings for recovering the same, or in respect thereof." S. 4. Ineffectual Crown grants.

These sections were reproduced, with doubtful benefit, from 21 Jac. 1, c. 2. The re-enactment of clause 1 of sect. 3 was an obvious error. It was originally an absolute saving of reversions then vested in James I., and, having regard to the fixed period of limitation—sixty years before 1623—the saving was not inappropriate. But it had no application to the Nullum Tempus Act with its new principle of a movable limitation: see *Tuthill* v. *Rogers* (1844), 1 Jo. & Lat. p. 83, a case in which the second clause was applied. There a reversion which had existed in George III.'s predecessors fell into possession in 1776, and an adverse possession of sixty years from that date was held to be a bar. If the clause was required, its restriction to reversions existing in predecessors of George III. was a mistake. The third clause was a mere repetition of the rule enacted in sect. 1. In fact, the object of the entire section was sufficiently attained by sect. 1: see 3 Inst. 191. In the case of a future estate in the Crown, the Crown's right to possession does not accrue until the determination of the particular estate, and until that happens the statute does not run. Sect. 4 deals with the case of a defective grant by the Crown of a particular estate. The Crown's right is to accrue at the same time as if the grant Effect of provisions as to future estates.

had been good, but the section applies only to grants by the predecessors of George III. It is not introduced into the Irish statute, and in fact it is obsolete.

Reversion on Crown lease.

The principle that in the case of a reversion the right of the Crown does not accrue until the reversion falls into possession applies to a reversion upon a lease for years; but in *Att.-Gen.* v. *Eardley* (1820), 8 Pri. 39, it appears to have been doubted whether the case was, in fact, saved under 9 Geo. 3, c. 16, and the following provision was introduced into the Crown Suits Act, 1861 (24 & 25 Vict. c. 62):—

Crown Suits Act, 1861, s. 4. Right of Crown accrues on determination of lease.

"In the construction of 9 Geo. 3, c. 16, and of this Act, the right or title of the Crown to any lands or hereditaments comprised in any lease for a term of years, or for life or lives, granted by the Crown, shall not be deemed to have first accrued until the expiration or determination of such lease as against any person whose possession of such lands or hereditaments, or whose receipt of the rents or profits thereof, shall have commenced during the term of such lease, or who shall claim under any person whose possession or receipt shall have so commenced."

The same provision is made for Ireland by sect. 3 of the Nullum Tempus (Ireland) Act, 1876 (39 & 40 Vict. c. 37).

Thus, during the currency of a Crown lease, the statute does not begin to run against the Crown in favour either of the lessee, or of a person in adverse receipt of the rents.

(iii.) *Saving Clauses.*

The remaining relevant sections of the Nullum Tempus Act may be stated as follows:—

Nullum Tempus Act, s. 5. Quit-rents, etc., preserved.

"All the said lands and hereditaments shall be held of the Crown and of other persons by the same tenures, services, fee-farms, chief rents, heriots, and other duties as the same ought to be holden if the estates established by this Act had been before the Act effectual.

S. 6. Saving of private rights.

"Saving to every person (other than the Crown) all such rights in the said lands or hereditaments as he had before the making of this Act.

S. 7. Rent-charges saved if actually paid.

"Where any fee-farm rent or other rents have been answered and actually paid to the Crown within the space of sixty years next before any proceeding shall be commenced for recovering the same or in respect thereof out of any manors, lands, or hereditaments, of which the estates, being defective, are established by this Act,

the Crown shall hold the said rents and arrearages thereof as fully as the same were enjoyed at any time within the said space of sixty years."

Receipt of quit-rents.

Sects. 5 and 6 are enacted in sect. 4 of the Irish Act, and sect. 7 in sect. 5 of that Act. All are reproduced from 21 Jac. 1, c. 2. These sections confirm the view that clause 2 of sect. 1 confers an actual estate upon the subject after sixty years' possession. Clause 2 "does not provide for the protection of actual title, in which there might be some defect or infirmity; but it validates the title and estate which the subject *claimed* to have. We find accordingly that the 4th and 5th sections [of the Irish Act] treat the first as having established and made sure the estates, rights, and interests of the subject": *Tuthill* v. *Rogers* (1844), 1 Jo. & Lat. p. 62, per Blackburne, M.R. The sections also confirm the view that the receipt of a quit-rent, or rent in the nature of a quit-rent, does not save the right of the Crown. To exclude the statute on the ground of receipt of rent, the Crown must have been in receipt of the general profits of the estate. In *Tuthill* v. *Rogers* (1844), 1 Jo. & Lat. 36, lands in Ireland were granted by Charles II. for an estate tail at a rent of £4 18*s*. 5½*d*. The estate tail determined in 1776, and for more than sixty years from that date the persons deriving title under the grantee continued in possession of the lands, claiming the fee, and paying the rent of £4 18*s*. 5½*d*. as quit-rent. It was held that this rent was distinguishable from the general profits of the land, and that the receipt of it was not a receipt of the "rents, revenues, issues, or profits" of the lands so as to exclude the statute. On the contrary, the statute confirmed the title of the possessors, but subject, by virtue of the sections now under consideration, to the quit-rent: 1 Jo. & Lat. p. 80; 3 Inst. 191.

Concealed titles.

The Act 21 Jac. 1, c. 2, concluded with a proviso against the statute being excluded by land being put in charge under grants of concealed or defective titles unless judgment for the Crown had been given within fifty years. This was needlessly repeated in the Nullum Tempus Act (sect. 10); it is omitted in the Irish statute.

(iv.) *Effect of Nullum Tempus Acts.*

Summary.

The effect of the Nullum Tempus Acts is as follows: Time runs against the Crown in respect of manors, lands, and other hereditaments (except liberties and franchises) from the date of accrual of the right of the Crown to possession; and the Crown's right is barred and its title extinguished in sixty years, unless within that period the Crown has been in actual receipt of the rents and profits. Receipt of a rent-charge or quit-rent out of the land saves the Crown's title to the rent, but not to the land; and receipt of the rents of part of an estate does not preserve the title to the whole estate. But actual receipt of a rent-charge is not necessary (in England) to keep it alive against the terre-tenant. It is sufficient if it is duly charged in the Crown books. In the case of a Crown lease the statute does not run against the Crown till the determination of the lease, notwithstanding that a stranger may be in possession or in receipt of the rents.

(3) *Duchy of Cornwall.*

Duchy of Cornwall.

The Duchy of Cornwall Act, 1844 (7 & 8 Vict. c. 105) enacts for lands and hereditaments of the Duchy in the county of Cornwall (other than liberties or franchises, and mines and minerals) a limitation of sixty years in manner similar to the Nullum Tempus Act. Time runs from the accrual of the right (sects. 71, 76), and the bar is complete in sixty years, unless the Duke of Cornwall or his predecessors in title have been answered the rents and profits [*or*—until the Crown Suits Act, 1861—*the same had been in charge or had stood insuper of record*] within the sixty years, and the Act affirms the title of the persons in whose favour time has run. Sect. 72 provides that the Duke of Cornwall is not to be deemed to have been answered the profits of lands which have been held, or the profits of which have been taken, by any other person for sixty years before suit by reason only of the same having been part of any honor, manor, or hereditament of which the rents have been taken by the Duke of Cornwall or his predecessors in title. This anticipated the amendment of the Nullum Tempus Act made by the Crown Suits Act, 1861, s. 3 (*supra*, p. 144), and sect. 1 of this latter Act is also by sect. 2 expressly applied to lands of the Duchy of Cornwall. Consequently the duchy rights are not now saved by lands having been

in charge or having stood *insuper* of record within the sixty years. Sect. 73 of the Duchy of Cornwall Act, 1844, imposes a limitation of sixty years on proceedings by the duke for the recovery of mines and minerals under lands in the county of Cornwall, where the lands have been adversely enjoyed for a period of sixty years without interruption by the duke or persons claiming under him, and where the mines and minerals have been substantially worked and gotten at any time during such period by the possessors of the lands; and where they have not been worked during such period, or the profits thereof received, by the duke or persons claiming under him. If, under the same conditions, the possessor has not worked the mines, the period of limitation is one hundred years (sect. 74). The Act enacts in sects. 76–79 provisions corresponding to those in sects. 3, 4, 5, and 7 of the Nullum Tempus Act (*supra*, pp. 148–150), and under sect. 4 of the Crown Suits Act, 1861, the statute does not run, in cases where land has been let on lease for years or lives, until the determination of the lease. Under 23 & 24 Vict. c. 53, and the Act of 1861 just mentioned, lands of the Duchy of Cornwall not in that county, and also claims to navigable rivers, estuaries, ports, or branches of the sea, or the soil thereof, or the shores between high and low water mark—which claims were excepted from the Duchy of Cornwall Act, by sect. 86—are made subject to the limitation of the Nullum Tempus Act, as amended by the Act of 1861.

Summary as to Duchy.

The result as to property of the Duchy of Cornwall is as follows:—

(1) Liberties and franchises are subject to no statutory limitations.

(2) Lands (other than foreshore, etc.) and mines and minerals within the county of Cornwall are subject to the limitation of 7 & 8 Vict. c. 105, as amended by sects. 1 and 2 of the Crown Suits Act, 1861.

(3) Foreshore, etc., whether within or without the county, and lands and mines and minerals without the county, are subject to the Nullum Tempus Act as amended by the Crown Suits Act, 1861.

CHAPTER II.

MONEY CHARGED ON LAND, JUDGMENTS, AND LEGACIES.

Rule of limitation.

THE R. P. L. A., 1874, by sect. 8 (replacing sect. 40 of the Act of 1833), imposes a twelve years' limit on sums of money charged on land, sums of money secured by judgment, and legacies:—

R. P. L. A., 1874, s. 8.

Mortgages, judgments, and legacies.

> "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same."

There follows a saving for part payment or acknowledgment, as to which see Chap. VII.

Notwithstanding the position of the word "judgment," the section extends to all judgments, whether charged on land or not. Personal estate of an intestate is subject to a twenty years' limitation under the Law of Property Amendment Act, 1860 (*infra*, p. 169).

SECTION I.—SUMS OF MONEY CHARGED UPON LAND OR RENT.

(1) *Money subject to Sect.* 8.

Scope of sect. 8.

Sect. 1 of the R. P. L. A., 1874, relates to actions to recover land; sect. 8 relates to actions to recover money: *Doe* v. *Williams* (1836), 5 A. & E. 291, 296; see *Kibble* v. *Fairthorne*, [1895] 1 Ch. 219, 224. Thus an action of foreclosure is barred by sect. 1: *Heath* v. *Pugh* (1881), 6 Q. B. D. p. 364, C. A. (*supra*, p. 9); an action on the covenant in the mortgage is barred by sect. 8: *Sutton* v. *Sutton* (1882), 22 C. D. 511, C. A. Actions to recover annuities charged on land are actions to recover rents, and are barred under sect. 1, while the recovery of arrears of the annuity is limited by sect. 42 of the R. P. L. A., 1833: *supra*, p. 27; *infra*, p. 176.

Mortgages and liens.

Sect. 8 applies by its express terms to sums of money secured by mortgage or lien—that is, by equitable lien as distinguished

from a possessory or common law lien. The form of the mortgage is immaterial, and, when formerly a charge might be preserved against the statute by an express trust (see now sect. 10 of the R. P. L. A., 1874, *infra*, p. 162), the exemption did not extend to a mortgage by way of trust for sale: *Humble* v. *Humble* (1857), 24 Beav. 535; *cf. Locking* v. *Parker* (1872), 8 Ch. 30 (*supra*, p. 72). Equitable liens "are founded upon the consideration of a duty or implied intention on the part of the owner of property to make it answerable for a specific claim": Fisher on Mortgages, 5th ed., p. 252. Of this nature is a vendor's lien for unpaid purchase-money, and such a lien is liable to be barred under the section: *Toft* v. *Stephenson* (1848), 7 Hare, 1. So also is the lien of a remainderman upon arrears of income due to the estate of the tenant for life to recoup to the remainderman interest paid by the tenant for life out of *corpus*: *Kirwan* v. *Kennedy* (1869), Ir. R. 3 Eq. 472.

Sums "otherwise charged upon or payable out of any land."

A sum of money is "charged upon" land within the meaning of the R. P. L. Acts when the land can only be enjoyed subject to its payment, although there is no direct remedy against the land itself: *Payne* v. *Esdaile* (1888), 13 App. Cas. 613 (*supra*, p. 26), decided on the same words in the definition of "rent" in sect. 1 of the R. P. L. A., 1833. The words do not include a bond debt in which the heir is bound: *Roddam* v. *Morley* (1856), 2 K. & J. 336; for although the heir or devisee of the obligor can only enjoy the land subject to the liability to pay the debt, it is free from such liability in the hands of a *bonâ fide* alienee for value: *British Mutual Investment Co.* v. *Smart* (1875), 10 Ch. 567. Thus the debt is not necessarily incident to the enjoyment of the land, and is not, therefore, "charged upon" the land. Moreover, money is not charged upon land unless there is land upon which the charge can take effect, and hence a charge of debts upon real estate, by a testator who leaves no real estate, is not affected by the section: *Re Hepburn* (1884), 14 Q. B. D. 394.

Election.

Compensation payable under the doctrine of election is probably charged upon land. If not, the limitation is six years from the date of election: *Spread* v. *Morgan* (1865), 11 H. L. C., p. 617.

Proceeds of sale of real estate.

The proceeds of sale of real estate directed to be sold are within the words "money charged upon or payable out of land": *Bowyer* v. *Woodman* (1867), 3 Eq. 313; *Kirkland* v. *Peatfield*, [1903] 1 K. B. 756; *cf. Pawsey* v. *Barnes* (1851), 20 L. J. Ch. 393.

(2) *Remedies which are barred.*

Specialty debt charged on land.

When a sum of money charged on land is also secured by covenant, the creditor has a remedy against the land and a remedy on the specialty against the debtor. Sect. 40 of the R. P. L. A., 1833 (3 & 4 Will. 4, c. 27), in terms barred every proceeding to recover such money, and therefore appeared to bar the action on the covenant as well as the remedy against the land. Actions on covenants were, however, subject to a twenty years' limitation by a later statute (c. 42) of the same session (the Civil Procedure Act, 1833), and, but for the identity of the periods, it would have been necessary to determine whether the action on the covenant was barred only by c. 42, or was included in the bar of c. 27. This question arose, however, with respect to arrears of rent and of interest, the limit of six years being imposed generally by sect. 42 of c. 27, while to an action on the lease or on the covenant the limit was twenty years under c. 42. Did sect. 42 bar the real and the personal remedy alike, or did it bar the real remedy only, leaving the creditor at liberty to recover twenty years' arrears, if his action was personal? The same question arose in respect of the twenty years' limitation under the Irish C. L. P. A. s. 20; *infra*, p. 197.

Former exception of personal remedies.

In *Henry* v. *Smith* (1842), 2 Dr. & War. p. 391; *cf. O'Hara* v. *Creagh* (1841), Long. & T. 65, Lord St. Leonards expressed the view that sect. 42 of c. 27 was an express bar to all remedies alike. But it was settled by a series of cases, terminating with *Hunter* v. *Nockolds* (1850), 1 Mac. & G. 640, that the real and personal remedies had each their separate period of limitation; or, more strictly, that while all remedies, real and personal, were *primâ facie* barred by c. 27, an exception as to actions on a covenant or on an indenture of demise was introduced by c. 42. Thus, where a principal sum charged on land, or a rent-charge, was secured by covenant, or where rent was reserved by indenture of demise, then proceedings for the recovery of arrears of interest (*Hughes* v. *Kelly* (1843), 3 Dr. & War. 482), or of rent, whether rent-charge or rent on a lease (*Harrison* v. *Duignan* (1842), 2 Dr. & War. 295; *Hunter* v. *Nockolds*; *cf. Percival* v. *Dunne* (1858), 9 Ir. C. L. R. 422), against the land, were barred in six years; but an action upon the covenant (*Strachan* v. *Thomas* (1840), 12 A. & E. 536; *Manning* v. *Phelps* (1854),

10 Ex. 59), or upon the indenture of demise (*Paget* v. *Foley* (1836), 2 Bing. N. C. 679), was barred in twenty years.

Real and personal remedies on covenant now barred together.

But when by sect. 8 of the R. P. L. A., 1874, the period in respect of sums of money charged on land was shortened to twelve years, the question was raised afresh, and it was necessary to determine, as to such sums, whether the section still barred the remedy against the land only, leaving the remedy on the covenant to the twenty years of the Civil Procedure Act, 1833. In *Sutton* v. *Sutton* (1882), 22 Ch. D. 511, C. A., it was held by the Court of Appeal that the old doctrine as to c. 42 being an exception out of c. 27 could not influence the construction of the Act of 1874, and that sect. 8, in barring generally any action for the recovery of money charged on land, must be taken to bar all remedies alike, both real and personal. Consequently where money is charged on land and secured also by covenant, the remedy against the land and the remedy on the covenant are both barred in twelve years. As to the subsequent history of this litigation, see *Re Turner* (1894), 43 W. R. 153.

Sutton v. *Sutton.*

Covenant in separate deed.

And the result is the same although the covenant by the mortgagor is contained in a separate deed. The money is still "secured by a mortgage," and the remedy on the collateral security is barred in twelve years: *Fearnside* v. *Flint* (1883), 22 C. D. 579; *Re Powers* (1885), 30 C. D. 291, C. A., *per* Bowen, L.J., at p. 297; and as to the doctrine of *Sutton* v. *Sutton*, see *Dower* v. *Dower* (1885), 15 L. R. Ir. 264; *Re Nugent's Trusts* (1885), 19 L. R. Ir. 140.

Surety covenanting in separate deed.

But while, as against a mortgagor, sect. 8 of the R. P. L. A., 1874, bars alike the real and the personal remedy, it does not bar the remedy against a surety who has bound himself by a bond separate from the mortgage: *Re Powers* (1885), 30 C. D. 291, C. A. An action on the bond, it was said in that case, was not an action to recover a sum of money charged on land, but to recover damages from a third person because the mortgagor did not pay. But where the surety joins in the covenant in the mortgage deed, it is possible that the remedy against him is barred with the remedies against the mortgagor and the land: see *Re Frisby* (1889), 43 C. D. 106, C. A., and note the divergent opinions of Cotton and Bowen, L.JJ.

Simple contract debt charged on land.

The doctrine of *Sutton* v. *Sutton* (*supra*) is based upon the express language of sect. 8 of the R. P. L. A., 1874. The

limitation of that section is upon all actions to recover money charged upon land, and hence it applies to an action upon a covenant for payment of money so charged, and it reduces to twelve years the period of twenty years which would otherwise be allowed on the covenant. But when a simple contract debt is charged on land, the limitation on the personal remedy is six years under the Limitation Act, 1623, and this is not extended to the twelve years of sect. 8 in analogy to *Sutton* v. *Sutton*, *Barnes* v. *Glenton*, [1899] 1 Q. B. 885, C. A. Nor is the remedy against the land reduced to six years. The two remedies have different periods of limitation, and the remedy against the land is subject to the twelve years' bar under sect. 8: *Re Stephens* (1889), 43 C. D. 39; *London and Midland Bank, Ltd.* v. *Mitchell*, [1899] 2 Ch. 161; *cf. Toplis* v. *Baker* (1789), 2 Cox, 118, 123; *Brocklehurst* v. *Jessop* (1835), 7 Sim. 438.

Charge of debts by will.

Where a testator charges his debts on, or creates a trust for their payment out of, personal estate, this does not revive debts barred at his death, nor does it stop the statute as to debts not then barred: *Scott* v. *Jones* (1838), 4 Cl. & F. 382; *Evans* v. *Tweedy* (1838), 1 Beav. 55; *Cadbury* v. *Smith* (1869), 9 Eq. 42. And where he charges his debts on real estate, this also does not revive debts barred at his death: *Briggs* v. *Wilson* (1853), 5 D. M. & G., p. 21; but as regards debts not then barred, and not already charged in land, it brings them within sect. 8 of the R. P. L. A., 1874, and the period of limitation is twelve years. Where the debts are charged on a blended fund of realty and personalty, apparently only a part proportionate to the realty takes the benefit of the twelve years' period: *Re Stephens* (1889), 42 C. D. 39. And this period runs, not from the due date of the debt, but from the testator's death. The debt then for the first time becomes money charged on land, and a new right to receive it arises. If it is a simple contract debt, it is still liable to be barred as against the personalty in six years from its due date; if a specialty debt, the effect may be to shorten the twenty years' period already running at the testator's death, unless, indeed, the creditor elects to disclaim the charge, and rely on his personal remedy alone.

Re Ball's 1909. 1 Ch. 291.

Direction to pay specified debts.

A direction in the will to pay specified debts has the effect of reviving statute-barred debts, as debts, and not as legacies, so that the executors of a creditor dying in the lifetime of the testator are entitled to the benefit of the direction: *Williamson*

v. *Naylor* (1838), 3 Y. & C. Ex. 208; *Clinton* v. *Brophy* (1847), 10 Ir. Eq. R. 139.

(3) *Date from which the Statute runs.*

"Present right to receive."

Sect. 8 of the R. P. L. A., 1874, provides that no action shall be brought to recover money charged on land, "but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same:" see *Farran* v. *Beresford* (1843), 10 Cl. and F. 319. Thus the statute runs from the time when there is a present right to receive the sum. In *Dillon* v. *Cruise* (1840), 3 Ir. Eq. R., p. 81, it was suggested that the present right to receive would not be deemed to accrue if there were no effectual means of enforcing it; but the section is not thus restricted. It is enough that there is a present right to receive money charged on land, though the time for enforcing the charge has not arrived: *Hornsey Local Board* v. *Monarch Building Society* (1889), 24 Q. B. D. 1, C. A.

Hornsey L. B. v. Monarch Building Society.

In that case a local authority had, upon the default of the frontage owners, executed paving works under the Public Health Act, 1848. By sect. 69 the expenses became a charge upon the premises fronting the street immediately on completion (see now sect. 257 of the Public Health Act, 1875)—namely, in 1875—but no apportionment was made till 1885, and the charge was not capable of being enforced till the latter year. Nevertheless it was held that a present right to receive the expenses accrued to the local authority immediately on completion, and the charge was barred, therefore, in 1887. "The section," said Lindley, L.J., "is dealing with charges on land, and it must be borne in mind that such charges are present charges and future charges, reversionary charges, charges in remainder, and such-like. One general form of expression is used to include the whole, and that expression is 'present right to receive.' It seems to me clear that the meaning is that in each case the moment to be looked to is the moment when the charge comes into present operation; for instance, when reversionary charges are being dealt with, the moment to be looked to is the moment when the reversion falls in and the charge takes effect in possession."

Vendor's lien.

Where purchase-money of land is secured by a lien upon the land, the right to receive the money accrues in general on the day fixed for completion, unless a title has not then been made out; in such case the right accrues upon the title being established: *Toft* v. *Stevenson* (1854), 5 D. M. & G. 735.

Future charges.

As stated in the passage just quoted from the judgment of Lindley, L.J., in *Hornsey Local Board* v. *Monarch Building Society* (*supra*), where a charge is future, the statute does not run against it till it falls into possession; where, for instance, a sum of money is to be raised out of land on the death of a specified person: *Re Hartley*, [1900] 1 Ch. 152. And similarly as to a future interest in an existing charge. During a life tenancy of the charge, no present right to receive accrues to the person entitled in remainder: *Burrowes* v. *Gore* (1856), 6 H. L. C., p. 955. Where a remainderman has a lien on the preceding life estate for interest paid out of corpus, he has no present right to receive the amount during the currency of the life estate, for, if the sum were raised, the tenant for life would be entitled to the income of it: *Kirwan* v. *Kennedy* (1869), Ir. R. 3 Eq. 472. But where a mortgage debt is secured by a present charge on land, the "right to receive" is not postponed by the fact that the covenant for payment stipulates that notice shall be given: *Hervey* v. *Wynn* (1905), 22 T. L. R. 93.

Present debt charged on future interest in land.

A sum of money presently due may be secured by a charge upon a future interest in land, and then the right to the real security may remain, although the personal remedy is barred. This depends on whether the charge is in such a form as to entitle the creditor, upon the interest falling into possession, to recover the land itself, or whether it only entitles him to have his charge raised by sale. Where the mortgage is by conveyance of the future interest, whether legal or equitable, or where it is equitable and contains an agreement, express or implied, to convey the legal estate, the mortgagee's remedy is by foreclosure, and is within sect. 1 of the R. P. L. A., 1874, and not sect. 8. Hence the statute does not run against this remedy till the interest falls into possession (sect. 3 of Act of 1833; sect. 2 of Act of 1874), though the personal remedy for the mortgage debt may be barred: *Hugill* v. *Wilkinson* (1888), 38 C. D. 480; *Re Conlan* (1892), 29 L. R. Ir. 199; *Kirkland* v. *Peatfield*, [1903] 1 K. B. 756; see *Re Lake's Trusts* (1890), 63 L. T. 416; *supra*, p. 87. But if the remedy is by sale only, as where a charge

on a future interest in land is created by will, the effect is different. The remedy is now within sect. 8, and as soon as the charge is payable, there is a right to have the future interest sold and to receive the money. The statute runs, therefore, so soon as the charge is payable: *Re Owen*, [1894] 3 Ch. 220; see *Shea* v. *Moore*, [1894] 1 I. R. 158, C. A.

Person capable of giving discharge.

For the statute to run it is further necessary that there should be a person capable of giving a discharge: see *per* Lindley, L.J., in *Hornsey Local Board* v. *Monarch Building Society* (1889), 24 Q. B. D. p. 10, C. A. The effect is to save the right of an infant, if no person is able to give a receipt for him: *Piggott* v. *Jefferson* (1841), 12 Sim. 26. But if the infant dies and administration is taken out to his estate, the right of the administrator accrues, under sect. 6 of the Act of 1833, on the death: *Re Bonsor & Smith's Contract* (1884), 34 C. D. 560, note; *cf. O'Reilly* v. *Walsh* (1872), 6 Ir. R. Eq. 555, p. 566; 7 *ibid.*, 167, where the question whether sect. 6 applied to sect. 40 of the Act of 1833 was raised but not decided. Where a charge is vested in trustees who cannot give a discharge, the above requirement may operate to save the rights of beneficiaries in remainder: *M'Carthy* v. *Daunt* (1848), 11 Ir. Eq. R. 29; *Carroll* v. *Hargrave* (1870), Ir. R. 5 Eq. 123, 548, C. A. But not where the trustees have power to call in the mortgage and give a receipt (*Barcroft* v. *Murphy*, [1896] 1 I. R. 590), as would usually be the case now having regard to the general power of giving receipts conferred on trustees by the Trustee Act, 1893, s. 20.

(4) *Money Secured by Express Trust.*

Trust for payment of debts: former law.

Previously to the R. P. L. A., 1833, a trust for the payment of debts out of real estate prevented the bar of the statute as to such estate: *Scott* v. *Jones* (1838), 4 Cl. & F. p. 396. Under the Act of 1833 it was at first held that sect. 40 was not affected by sect. 25, and consequently a debt secured by a trust for payment (*Young* v. *Wilton* (1846), 10 Ir. Eq. R. 10), or a debt or legacy charged on land (*Knox* v. *Kelly* (1844), 6 Ir. Eq. R. 279), was not saved on the ground of express trust; *cf. Dillon* v. *Cruise* (1840), 3 Ir. Eq. R. 70. Subsequently it came to be admitted that both sect. 40 and sect. 42 were subject to sect. 25; and debts, legacies, and portions were saved by an express trust (*Cunningham* v. *Foot* (1878), 3 App. Cas. 974), as where a term was vested in trustees upon trust to raise specific sums: *Young* v. *Lord*

Waterpark (1842), 13 Sim. 199; *Cox* v. *Dolman* (1852), 2 D. M. & G. 592; *Lawton* v. *Ford* (1866), 2 Eq. 97; or where land was conveyed on trust to raise portions: *Blair* v. *Nugent* (1846), 9 Ir. Eq. R. 400; or where the land charged was devised in trust: *Hunt* v. *Bateman* (1848), 10 Ir. Eq. R. 360; *Watson* v. *Saul* (1859), 1 Giff. 188. In the last case the express trust was held to affect the charge also. But for this purpose a devise in trust was essential. A general charge of debts on real estate did not create an express trust for their payment if the devisee subject to the charge took beneficially: *Francis* v. *Grover* (1845), 5 Hare, 39; *Dundas* v. *Blake* (1848), 11 Ir. Eq. R. 138; *Proud* v. *Proud* (1862), 32 Beav. 234; even though the charge was to be raised by executors: *Jacquet* v. *Jacquet* (1859), 27 Beav. 332; *Dickenson* v. *Teesdale* (1862), 1 D. J. & S. 52. A devise in trust for the payment of debts did not revive debts which were already barred at the time of the testator's death: *Fergus* v. *Gore* (1803), 1 Sch. & Lef. 107; *Burke* v. *Jones* (1813), 2 V. & B. 275; *Hargreaves* v. *Michell* (1822), 6 Madd. 326; *O'Connor* v. *Haslam* (1855), 5 H. L. C. 170.

Express trust does not save statute.

But it is now provided that an express trust shall not save the statute either (1) as to sums of money or legacies charged upon or payable out of land, or (2) as to arrears of rent or of interest in respect of any such sum of money or legacy:—

R. P. L. A., 1874, s. 10. Time for recovery of money charged on land not extended by express trust.

> "After the commencement of this Act no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust."

Consequently the period of limitation is now the same whether land is charged with debts or is devised on trust to pay them: *supra*, p. 158.

A conveyance of land to trustees for a term of years upon trust to raise a specific sum is an express trust within the meaning of the section: *Re Hartley*, [1900] 1 Ch. 152. And where the trusts are to raise different sums at different times and one is barred, the entry of the trustees to raise a subsequent sum does not enable them to retain the land to raise the barred sum: S. C.

Annuity.

The section does not apply in the case of an annuity charged on land. The annuity is a rent-charge within the R. P. L. A., 1874, s. 1; not a sum of money or series of sums of money charged on land within the R. P. L. A., 1874, s. 8: *supra*, p. 28; and the title to recover the annuity as such can be kept alive by an express trust. But since arrears of the annuity are only recoverable as if there were no trust, then, after the lapse of the twelve years, no arrears are recoverable at all, since, in the absence of a trust, the annuity itself would have been extinguished. This was the result arrived at by Kay, J., in *Hughes* v. *Coles* (1884), 27 C. D. 231, though in an unsatisfactory manner: see *Dower* v. *Dower* (1885), 15 L. R. Ir. p. 275; *Hanly* v. *Carroll*, [1907] 1 I. R. 166. He appear to have first treated the annuity as a series of sums, subject as to past instalments to sects. 8 and 10, and consequently barred; but still in existence as to future instalments; and then, for the purpose of further barring arrears, to have treated it as a rent within sect. 1. This is needless and confusing. The matter is determined clearly and easily by treating the annuity as a rent throughout. The trust saves the annuity as a rent, but, by the express words of sect. 10, it does not save arrears, which are therefore gone as soon as the annuity would, as a rent and apart from any trust, be extinguished.

(5) *Death Duties.*

Death duties.

Succession duty is a first charge on the interest of the successor, and of all persons claiming in his right, in all the real property in respect whereof such duty is assessed: Succ. Duty Act, 1853 (16 & 17 Vict. c. 51), s. 42; and, apart from special limitation, time would be no bar to the enforcement of the charge by the Crown. But a limitation in favour of purchasers for valuable consideration—including trustees of a marriage settlement: see *Re Donelan's Estate*, [1902] 1 I. R. 109, C. A. —and mortgagees, was introduced by the Customs and Inland Rev. Act, 1889 (52 Vict. c. 7), s. 12. As against such persons real property, or any estate or interest therein, is not to remain charged with or liable to pay succession duty after the expiration of six years from the date of notice to the Inland Revenue Commissioners of the fact giving rise to the claim for duty, or from the date of the first payment of any instalment or part of

duty (*a*), or, in the absence of such notice or payment, after the expiration of twelve years from the happening of the event which gave rise to the claim for duty. This limitation also applies, in favour of the same persons, to claims for estate duty charged on land: Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 8 (2), 9 (1).

Section II.—Judgments.

(1) *All Judgments liable to be barred.*

Judgments formerly a potential charge on lands.

Sect. 8 of the R. P. L. A., 1874, bars any action to recover a sum of money "secured by any mortgage, judgment, or lien, or *otherwise* charged upon or payable out of any land," and the words in sect. 40 of the Act of 1833 were the same. The word "otherwise" seems to show, as was pointed out by Lord St. Leonards in *Henry* v. *Smith* (1842), 2 Dr. & War., p. 388, that all the sums of money to which the section refers must be in some way charged upon or payable out of land or rent; and since in 1833 all judgments were potentially charged on any land which the debtor might have, the introduction of judgments into the section was not altogether inconsistent with this construction. The lands were at all times subject to the creditor's right to enforce his judgment by *elegit*, notwithstanding sale or mortgage, subject only to the protection afforded to purchasers without notice by the Docket Acts: see *Henry* v. *Smith* (*supra*); *Anglo-Italian Bank* v. *Davies* (1878), 9 C. D., p. 284, C. A.; Elphinstone and Clark on Searches, p. 15.

And sect. 40 of R. P. L. A., 1833, barred all judgments.

The position of "judgment" in sect. 40 being thus explained, it was considered that the intention of the statute was to bar judgments generally, irrespective of their being really charged on land, and the section operated to bar the remedy against the personal estate of the debtor without inquiry whether he had any real estate or not: *Watson* v. *Birch* (1847), 15 Sim. 523; see Sugden's Real Property Statutes, p. 127; *O'Hara* v. *Creagh* (1841), 3 Ir. Eq. R. 179.

Sect. 8 of R. P. L. A., 1874, also bars all judgments.

By subsequent legislation the effect of judgments in creating a charge on land has been altered. By the Judgments Act, 1864 (27 & 28 Vict. c. 112), a judgment did not constitute a

(*a*) See further, for the case of payment, the alternative period mentioned in the section.

charge on the land until the land was delivered in execution; and by the Land Charges, etc., Act, 1888 (51 & 52 Vict. c. 51), a judgment is not a charge until a writ of execution or an order for a receiver has been registered. But these changes have not affected the construction of the R. P. L. Acts, and it was held by the Court of Appeal in *Jay* v. *Johnstone*, [1893] 1 Q. B. 189, that the Legislature, in repeating in sect. 8 of the Act of 1874 the words of sect. 40 of the Act of 1833, must be taken to have intended to repeat them with their old meaning. Hence sect. 8 operates, just as formerly sect. 40 operated, as a bar to all judgments alike: *cf. Ex parte Tynte* (1880), 15 C. D. 125; *Hebblethwaite* v. *Peevor*, [1892] 1 Q. B. 124.

Limitation on judgments in Ireland.

In Ireland the course of legislation has been different, and judgments were at one time classed with specialty debts for the purpose of limitation. The Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), did not apply to that country; but sect. 32 of 3 & 4 Vict. c. 105 (known as Pigot's Act), imposed on actions on specialties the same limitation as that imposed by sect. 3 of c. 42. Sect. 32 did not extend to judgments, but the same statute, by sect. 22, made judgment debts a direct equitable charge on the judgment debtor's lands, and, by sect. 26, made them carry interest, and the Judgment Mortgage (Ireland) Act, 1850 (13 & 14 Vict. c. 29), by sect. 7, enabled the creditor, by filing the prescribed affidavit, to give his judgment the effect of a legal mortgage. Thus it was easy to bring judgments within sect. 40 of the R. P. L. A., 1833, as being charged on land. But the Irish Common Law Procedure Act, 1853 (16 & 17 Vict. c. 113), repealed sect. 32 of Pigot's Act, and by sect. 20 reproduced sect. 3 of 3 & 4 Will. 4, c. 42, including, however, judgments with specialty debts. Hence, upon the principle of *Hunter* v. *Nockolds* (1850), 1 Mac. & G. 640 (*supra*, p. [illegible]), assuming it to be applicable (see *Re Fitzgerald*, [1897] 1 I. R. 556, p. 568), the remedy on the judgment against the land was now barred by sect. 40 of the R. P. L. A., 1833, and the remedy against the debtor's personal estate was barred by sect. 20 of the Ir. C. L. P. A., 1853: *Breslin* v. *Hodgens* (1876), Ir. R. 10 Eq. 260. The question became important when the limitation of sect. 40 was reduced to twelve years by sect. 8 of the Act of 1874, but it was decided, in accordance with *Sutton* v. *Sutton* (1882), 22 C. D. 511, C. A., that sect. 8, in effect, repealed sect. 20 of the Act of 1853, so far as regards judgments, and

that the twelve years' limitation of sect. 8 applies to all remedies on the judgment, real and personal, alike; moreover, the section is not affected by the statutory changes which have taken place with regard to the effect of judgments in creating a charge on land, and sect. 8 now bars all remedies on all judgments in Ireland as well as in England: *Evans* v. *O'Donnell* (1886), 18 L. R. Ir. 170, C. A.; *Sherwood* v. *Hannan* (1886), 17 L. R. Ir. 270, C. A.; *cf.*, as to decrees in equity, *Dunne* v. *Doyle* (1860), 10 Ir. Ch. R. 502; and see definition of judgment in sect. 100 of the Judicature Act, 1873.

(2) *Date from which the Statute runs.*

Judgment on *post obit* bonds.

Primâ facie the statute runs against a judgment from its date, but where it is entered up as a security, evidence is admissible to show when the right to receive the sum secured really accrues. Hence time does not run against a judgment entered on a *post obit* bond until the occurrence of the death on which the bond is payable: *Barber* v. *Shore* (1839), 1 Jebb. & S. 610; *Tuckey* v. *Hawkins* (1847), 4 C. B. 655; *Gilman* v. *Chute* (1847), 11 Ir. L. R. 442; *Kennedy* v. *Whaley* (1848), 12 Ir. L. R. 54.

Judgment registered as mortgage in Ireland.

The registration of a judgment in Ireland as a judgment mortgage against the lands of the judgment debtor under sect. 7 of the Judgment Mortgage (Ireland) Act, 1850 (13 & 14 Vict. c. 29), does not give a fresh right to receive the money secured by the mortgage, and the statute still runs from the date of the judgment: *Johnson* v. *Lowry*, [1900] 1 I. R. 316, C. A.

Revivor of judgment.

Sect. 8 of the R. P. L. A., 1874, repeating the language of sect. 40 of the Act of 1833, speaks of the time when the right to receive accrues; not like sect. 1, of the time when it *first* accrues: *Ryan* v. *Cambie* (1840), 2 Ir. Eq. R. p. 334; and hence, if a fresh right accrues in respect of the same debt, this will give a new starting-point for the statute. Under the old procedure for reviving judgments, a new right to receive a judgment debt accrued upon a revivor of the original judgment by *sci. fa.* or writ of revivor: *Farran* v. *Beresford* (1843), 10 Cl. & F. 319; *Farrell* v. *Gleeson* (1844), 11 Cl. & F. 702; *Conlan* v. *Bodkin* (1845), 7 Ir. L. R. 467; *Re Blake* (1853), 2 Ir. Ch. R. 643; or upon a fresh judgment being obtained in an action on the original judgment: *Walters* v. *Lidwill* (1847), 9 Ir.

L. R. 362. But proceedings could not be taken to revive a judgment after the lapse of twenty years: *Dunne* v. *Doyle* (1860), 10 Ir. Ch. R. 502; *cf. Johnson* v. *Bell* (1856), 6 Ir. C. L. R. 526; unless the right to receive had been kept alive by payment or otherwise: *Williams* v. *Welch* (1846), 3 Dowl. & L. 565. And the new right arising upon revivor of a judgment was only operative against parties or privies to the revivor: *Kirkwood* v. *Lloyd* (1849), 12 Ir. Eq. R. 585; *cf. Re Bodkin* (1860), 12 Ir. Ch. R. 61.

Present procedure for extending judgment.

An action can still be brought upon the original judgment at any time within twelve years, though such a course is unusual, save in the case of a foreign judgment; but the procedure by *sci. fa.* or writ of revivor has been abolished, and its place is now taken by R. S. C., 1883, Ord. 42, rr. 22, 23. As between the original parties to the judgment, execution may issue at any time within six years from the recovery of the judgment (r. 22). But where the six years have elapsed, leave to issue execution must be obtained. This leave cannot be given after the twelve years limited by the statute have expired: *Jay* v. *Johnstone*, [1893] 1 Q. B. 189, C. A.; *Evans* v. *O'Donnell* (1885), 16 L. R. Ir. p. 452; 18 L. R. Ir. 170, C. A.; and where it is given, it probably does not create a fresh right to receive so as to exclude the statute as under the former writ of revivor: *cf. Evans* v. *O'Donnell*, 16 L. R. Ir. p. 452.

Reversionary interest.

Where a debt is secured by a mortgage of a reversionary interest in personal estate, and judgment is obtained on the debt, the mortgagee is entitled to recover the personal estate on its falling into possession, notwithstanding that the judgment is then barred: *Re Lake's Trust* (1890), 63 L. T. 416.

Section III.—Legacies and Intestates' Estates.

(1) *Legacies and Shares of Residue.*

Limitation applies to all legacies.

Notwithstanding certain doubts which have been suggested as to the intention of the Legislature in introducing legacies into sect. 40 of the Act of 1833 (*Coope* v. *Cresswell* (1866), 2 Eq., p. 116; *Phillippo* v. *Munnings* (1837), 2 My. & Cr., p. 315, note), the position of the word shows with sufficient clearness that it is used generally; and it has long been settled that the statute applies equally whether the legacy is payable out of real or

personal estate: *Shepherd* v. *Duke* (1839), 9 Sim. 567; *Bullock* v. *Downes* (1860), 9 H. L. C., p. 14. Sect. 8 of the Act of 1874 merely reproduces in this respect sect. 40 of the Act of 1833. If the legacy is charged on land, it is not saved by an express trust; but, otherwise, an express trust will save the legacy if the executor has ceased to hold it as executor and has become a trustee: *infra*, p. 172. Where there is no trust, an action for administration to recover the legacy is barred in twelve years: *Russell* v. *Crowley*, [1907] 1 I. R. 275. Sect. 43 of the Act of 1833 applied the bar to suits or other proceedings to recover a legacy in any spiritual court, but such proceedings are not now possible: Court of Probate Act, 1857 (20 & 21 Vict. c. 77), ss. 3, 23.

Annuity.

An annuity given by will is, in general, regarded as a legacy: *D. of Bolton* v. *Williams* (1781), 2 Ves. J., p. 216; *Sibley* v. *Perry* (1802), 7 Ves., p. 533; *Re Ashwell's Will* (1859), Johns. 112; *Dower* v. *Dower* (1885), 15 L. R. Ir. 264; though for the purpose of a particular will it may be necessary to construe the word "legacy" so as not to include annuities: *Cornfield* v. *Wyndham* (1845), 2 Coll. 184. But sect. 8, which bars the right to recover particular sums of money, is not fitted to bar the right to the annuity as a whole. If it is charged on land, it is liable to be barred as "rent," and the title extinguished: *supra*, p. 28. But where it is not so charged, there is no bar to the annuity itself, and sect. 8 only bars the right to recover each instalment more than twelve years after it has fallen due: *Dower* v. *Dower* (1885), 15 L. R. Ir. 264. The arrears are not subject to the six years' limitation of sect. 42 of the Act of 1833: *Roch* v. *Callen* (1847), 6 Hare, 531. Thus the annuity is recoverable at any time with twelve years' arrears. Similarly, where an annuity is subject to the Limitation Act, 1623, six years' arrears are recoverable at any time: *Edwards* v. *Warden* (1874), 9 Ch. 495. In this last case it was held in the House of Lords (1 App. Cas. 281) that there was an express trust which excluded the statute.

Share of residue.

A residue or a share of residue given by will is, in effect, a legacy, and the residuary legatee cannot recover it against the executor after the lapse of twelve years from the time when he had a present right to receive it: *Prior* v. *Horniblow* (1836), 2 Y. & C. Ex. 200; *Christian* v. *Devereux* (1841), 12 Sim. 264; *Adams* v. *Barry* (1845), 2 Coll. p. 290; *Downes* v. *Bullock* (1858),

25 Beav. 54, at p. 61; that is, in general, from the end of a year after the testator's death: *infra*, p. 170.

Where the person liable to pay the legacy is also the person entitled to receive it, the statute does not run: *Binns* v. *Nichols* (1866), 2 Eq. 256; *Re Pardoe*, [1906] 1 Ch. 265; *cf. supra*, p. 87. Suspension of statute.

Lapse of time is no bar to the right of an executor to have his accounts taken: *Smith* v. *O'Grady* (1870), L. R. 3 P. C. 311.

(2) *Personal Estate of Intestates.*

A similar limitation with regard to the personal estate of an intestate was introduced by sect. 13 of the Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), which, after reciting sect. 40 of the R. P. L. A., 1833, enacts as follows:—

> "No suit or other proceeding shall be brought to recover the personal estate, or any share of the personal estate, of any person dying intestate, possessed by the legal personal representative of such intestate, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same." 23 & 24 Vict. c. 38, s. 13. Twenty years' limitation for personal estate of intestate.

There follows a saving for part payment or acknowledgment, as to which see Chap. VII.

The limitation of this section still remains at twenty years, there having been no reduction to twelve years corresponding to that made in the case of legacies by sect. 8 of the R. P. L. A., 1874. The effect of the statute in favour of an administrator is not avoided by a revocation of the letters of administration: *Willis* v. *Earl Beauchamp* (1886), 11 P. D. 59, C. A. It was held that the Act was retrospective, and applied to claims made in respect of the estates of intestates who died before December 31, 1860, when the Act came into operation: *Willis* v. *Earl Howe* (1880), 29 W. R. 70; *Re Johnson, Sly* v. *Blake* (1885), 29 C. D. 964. The statute operates to bar claims by the Crown to personal estate of an intestate in the same manner as claims of an individual: Intestates' Estates Act, 1884 (47 & 48 Vict. c. 71), s. 3. Effect of statute.

Where a person dies leaving a will, but in the result his property or some part of it is undisposed of, the executor is, by virtue of the Executors Act, 1830 (11 Geo. 4 and 1 Will. 4, c. 40), to be deemed to be a trustee of the undisposed of residue for the next-of-kin. But this does not make him an express trustee, Partial intestacy.

and he is entitled to the benefit of the statute: *Re Lacy*, [1899] 2 Ch. 149.

(3) *Date from which the Statute runs.*

Present right to receive legacy, etc.

The right to receive a legacy arises at the end of twelve months from the testator's death (*Wood* v. *Penoyre* (1807), 13 Ves. 333), and from such time therefore the statute runs: *Earle* v. *Bellingham* (1857), 24 Beav. 448. And, in the absence of special circumstances, the same rule holds as to a share of residue (see *Brook* v. *Lewis* (1822), 6 Madd. 358), or a share of an intestate's estate: *Re Johnson, Sly* v. *Blake* (1885), 29 C. D. 964, p. 970. But in Ireland it has been held that the statute runs from the death: *Waddell* v. *Harshaw*, [1905] 1 I. R. 416, C. A.

Re Pardoe.

It was held in *Re Pardoe*, [1906] 1 Ch. 265, that a present right to receive personal estate of an intestate does not accrue to a person capable of giving a discharge for the same within sect. 13 of the Law of Property Amendment Act, 1860, unless such person is in a position to recover the property by an action at law. The circumstance that he might reach it by proceedings in equity does not bring the statute into operation. A., a married woman, was the administratrix of an intestate. In 1864, money of the intestate was paid to her and to her husband, B., in her right. She was beneficially entitled to one-half of it: the other half was payable to A., B., and C. as executors of D., in whose estate A. had a life interest. B. paid the money into his private banking account and never accounted for it. B. died in 1884, C. in 1886, and A. in 1903. After A.'s death an action was commenced to make B.'s estate liable for half the fund, and to this the statute was pleaded unsuccessfully. The only date suggested for the commencement of the statute was 1864, when the executors of D. were entitled to receive the money. But at that time two of them, A. and B. had received it, and the third, C., could not have brought an action at law against his co-executors to recover it. Hence the statute did not begin to run in 1864: *per* Kekewich, J. But the decision, which was reversed on another point by the Court of Appeal, [1906] 2 Ch. 340, must be received with caution. There appears to be no ground for restricting "a present right to receive" in the manner suggested; and such restriction is inconsistent with

Hornsey Local Board v. *Monarch Building Society* (1889), 24 Q. B. D. 1, C. A. (*supra*, p. 159).

Present right extends only to assets recovered by executor.

The statute only runs in respect of assets actually received by the executor or administrator; it does not entitle him to retain for his own benefit property which he recovers after a lapse of thirteen years: *Adams* v. *Barry* (1845), 2 Coll. 285; *Binns* v. *Nicholls* (1866), 2 Eq. 256. "The enactments," said Chitty, J., in *Sly* v. *Blake* (1885), 29 C. D. p. 971, "speak not merely of a right to receive, but emphatically of a present right to receive. The next of kin have no present right to receive from the administrator a reversionary interest belonging to the intestate before it falls into possession and is possessed by him, nor, where he is compelled to take proceedings to recover an outstanding asset, before he recovers it or obtains possession of it."

Legacy out of incumbered real estate.

The same principle applies where a legacy is payable out of real estate, and the real estate is not immediately available by reason of prior charges: *Faulkner* v. *Daniel* (1843), 3 Hare, p. 212; *Ravenscroft* v. *Frisby* (1844), 1 Coll. p. 22. But if the legacy is primarily payable out of personal estate, and this has been exhausted, it lies upon the legatee, in claiming against the real estate, to show that the executor has not had in his hands sufficient to satisfy him; otherwise the legatee would have had a present right to receive so as to make the statute run: *Bright* v. *Larcher* (1859), 4 De. G. & J. 608; *cf.* *Proud* v. *Price* (1862), 32 Beav. 234, 11 W. R. 101.

Or primarily payable out of personal estate.

Future interest in present legacy.

Where a legacy is given to one for life, with remainder over, no present right to receive accrues to the remainderman, and the statute does not begin to run against him, till the death of the tenant for life: *Prior* v. *Horniblow* (1836), 2 Y. & C. Ex. 200; and similarly, where the absolute vesting in the legatee is in suspense during his life, time does not run till his death: *Lord* v. *Lord* (1857), 3 Jur. N. S. 485.

Future legacy.

Where a legacy is to be paid out of a reversionary fund, or is to be paid upon the death of a specified person or other event, although the right to the legacy is vested, the right to receive it does not arise, and the statute does not run, till the fund falls into possession (*Re Ludlam* (1890), 63 L. T. 330), or till the death (*Earle* v. *Bellingham* (1857), 24 Beav. 448), or happening of the event: *Rudd* v. *Rudd*, [1895] 1 I. R. 15, C. A. In *Rudd* v. *Rudd* a legacy was to be paid when required by the

legatee to advance her in life, and the statute did not run till the legacy was thus required.

But where the tenant for life and remaindermen concur in an arrangement under which the tenant for life receives a lump sum, and the estate is to be at once divisible among the remaindermen, a present right to receive accrues to them, and the statute runs: *Russell* v. *Crowley*, [1907] 1 I. R. 275, C. A.

Mortgage of future interest.

Where a future interest in a legacy is assigned by way of mortgage, the mortgagee is entitled to receive it when it falls into possession, although his right to recover the mortgage debt from the mortgagor personally may then be barred: *Seager* v. *Alston* (1857), 26 L. J. Ch. 809; *cf. Re Lake's Trusts* (1890), 63 L. T. 416.

Where an executor has had assets to pay a legacy, and the statute has run in his favour, a charge of debts contained in his will does not create any fresh right in the legatee: *Piggot* v. *Jefferson* (1841), 12 Sim. 26; *cf. Harcourt* v. *White* (1860), 28 Beav. p. 309.

If the statute is running against a legatee, it is not suspended by the lunacy of the executor: *Boldero* v. *Halpin* (1870), 19 W. R. 320.

(4) *Legacies held in Trust.*

Executor becoming trustee.

The limitations in respect of legacies and shares of intestates' estates operate in favour of legal personal representatives generally, as well in respect of assets retained as of assets distributed: *Re Johnson, Sly* v. *Blake* (1885), 29 C. D., p. 973; *Re Davis, Evans* v. *Moore*, [1891] 3 Ch. 119, C. A.; though an opposite opinion was expressed in *Reed* v. *Fenn* (1866), 14 W. R. 704. An executor is not an express trustee: *Re Lacy*, [1899] 2 Ch. 149; nor is an executor *de son tort*: *Doyle* v. *Foley*, [1903] 2 I. R. 95. Where, however, the same person is named in a will as executor and as trustee of a legacy, then as soon as he has assented to the legacy as executor, and has set apart a sum of money to answer it, he holds in his character of trustee, and time does not run against the *cestui que trust*; *Phillipo* v. *Munnings* (1837), 2 M. & Cr. 309; *cf. Harcourt* v. *White* (1860), 28 Beav. p. 309; *Daly* v. *Kirwan* (1839), 1 Ir. Eq. R. 156; *Dix* v. *Burford* (1854), 19 Beav. 409. And the same result follows where his duties as an executor are at an end, and the legacy or residue is, in effect, held simply upon the trusts of the will: *Re Timmis*, [1902] 1 Ch. 176.

But an executor does not become trustee of a legacy merely in consequence of the debts being paid and the clear residue ascertained. There must be an express trust created either by the will: *Cadbury* v. *Smith* (1869), 9 Eq. 37; *Re Barker*, [1892] 2 Ch. 491; or by the executor's actual declaration that he holds as trustee: *Tyson* v. *Jackson* (1861), 30 Beav. 384; *Re Rowe, Jacobs* v. *Hind* (1889), 60 L. T., p. 599. Perhaps, also, a trust may be created by the fact that the executor holds for an infant, and has special duties to perform in regard to his share: *O'Reilly* v. *Walsh* (1872), 6 Ir. Rep. Eq. 555; 7 *ibid.* 167; *cf. Re Smith, Henderson-Rowe* v. *Hitchens* (1889), 42 C. D. 302. An executor does not become an express trustee by investing and otherwise dealing with property of the beneficiaries and by defending proceedings on their behalf: *Re Mackay*, [1906] 1 Ch. 25. But if the executor, having become a trustee, has distributed the legacy in an erroneous manner, he can claim the benefit of the Trustee Act, 1888, s. 8; and none the less that, in the distribution, he has taken a share to which he was properly entitled: *Re Timmis* (*supra*).

Trust legacies charged on land;

Where the money representing a legacy has not been actually raised, but is charged on land and secured by an express trust, the trust does not prevent the operation of the statute, and it is recoverable only within the same period as if there were no trust: R. P. L. A., 1874, s. 10 (*supra*, p. 162). And since an annuity given by will is a legacy, it may be that, if it is charged on land, an express trust will save neither the title to the annuity, nor the arrears. The question was raised, but not decided, in *Hanly* v. *Carroll*, [1907] 1 I. R. 166. It would seem, however, that such an annuity is on the same footing as an annuity created by deed, and the title to the annuity itself can be saved by an express trust, though not the right to recover arrears: *supra*, p. 163. Sect. 10 does not apply to legacies or annuities charged only on personal property (other than leaseholds), and these are saved by an express trust: *cf. Playfair* v. *Cooper* (1853), 17 Beav. 187; *Hartford* v. *Power* (1868), Ir. R. 2 Eq. 204; but not by an implied trust: *Henderson* v. *Atkins* (1859), 28 L. J. Ch. 913.

charged on personalty.

Legacy out of funds in Court.

Where the fund out of which a legacy is payable is paid into Court to an account the title of which shows that the persons claiming as legatees are interested, the statute does not run against them: *Re Walker* (1871), 7 Ch. 120.

CHAPTER III.

ARREARS OF DOWER, OF RENT, AND OF INTEREST.

Six years limitation.

A LIMITATION of six years is placed on the recovery of arrears of dower, of rent, and of interest on sums of money charged on land, judgments, and legacies; that is, on the moneys referred to in sect. 8 of the R. P. L. A., 1874:—

R. P. L. A., 1833, s. 41. Arrears of dower.

> "No arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit.

Sect. 42. Arrears of rent and interest.

> "No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent."

There follows a proviso in respect of the case where a prior incumbrancer is in possession (*infra*, p. 179).

SECTION I.—ARREARS OF DOWER.

Dower.

By the Statute of Merton, c. 1 (20 Hen. 3, repealed as to c. 1 by the Stat. Law Rev. Act, 1881, 44 & 45 Vict. c. 59) widows deforced of their dowers, who were driven to recover them by writ of dower, were allowed to recover also as damages the value of the whole dower from the time of the death of the husband until judgment for the recovery of seisin of dower. But a widow was only entitled to dower out of lands of which her husband had died seised, either in deed or in law, for an estate of inheritance: Litt. 36, Co. Litt. 31*a*, 32*b*; *Curtis* v. *Curtis* (1789),

2 Bro. C. C. at p. 630; and hence, to entitle a widow to damages for dower, it was formerly necessary to allege and prove that the husband died seised for such an estate: *Jones* v. *Jones* (1832), 2 Cr. & J. 601. Now, by the Dower Act, 1833, sects. 2 and 3, the widow is entitled to dower out of equitable estates of inheritance, and, as to legal estates, seisin at the time of death is not necessary. The widow has her dower although the husband had merely a right of entry or right of action. Before proceeding for dower a demand must be made, but no special formalities are required: *Watson* v. *Watson* (1850), 10 C. B. 3. Formerly there was no time of limitation for arrears of dower either at law or in equity: *Oliver* v. *Richardson* (1803), 9 Ves. 222. The present restriction to a period of six years before the commencement of the action was applied in *Bamford* v. *Bamford* (1845), 5 Hare, 203.

Section II.—Arrears of Rent.

Limitation applies to rent-charges and rents on leases.

Sect. 42 of the Act of 1833 limits the recovery of rent to six years' arrears. At first there was a tendency to restrict the section to rents in the nature of rent-charges, as in the case of sect. 2 of the same Act (now sect. 1 of the Act of 1874): see *per* Tindal, C.J., in *Paget* v. *Foley* (1836), 2 Bing. N. C. p. 688; *Ex parte Warburton* (1847), 10 Ir. Eq. R. 206. But the considerations which determined the construction of sect. 2 do not apply here, and, in accordance with the definition of "rent" in sect. 1 (*supra*, p. 21), the six years' limit applies both to rent-charges (*Humfrey* v. *Gery* (1849), 7 C. B. 567), and to rents reserved on leases: *Archbold* v. *Scully* (1861), 9 H. L. C. p. 375; *Bruen* v. *Nowlan* (1837), 1 Jebb & Sym. 346, note; *Hughes* v. *Kelly* (1843), 3 Dr. & War. p. 492. In the case of holdings within the Agricultural Holdings Act, 1908 (8 Ed. 7, c. 28), only one year's arrears can be recovered by distress: sect. 28.

Agricultural holdings.

Tithe rent-charge.

Tithe rent-charge is "rent" within sect. 1 of the R. P. L. A., 1833 (*supra*, p. 27), and, apart from special legislation, six years' arrears would be recoverable: *Ecclesiastical Commissioners* v. *Sligo* (1855), 5 Ir. Ch. R. 46. But by sect. 81 of the Tithe Act, 1836 (6 & 7 Will. 4, c. 71), only two years' arrears were recoverable by distress: *Re Camberwell Rent-charge* (1843), 4 Q. B. 151; and a corresponding limitation is imposed by the Tithe

Act, 1891 (54 Vict. c. 8), which now regulates proceedings for the recovery of tithe rent-charge. Sect. 10 (2) provides that "a sum on account of tithe rent-charge shall not be recoverable under this Act unless proceedings for such recovery have been commenced before the expiration of two years from the date at which it became payable." The rent-charge is recoverable by application to the county court as provided by sect. 2 (1). Where the occupier is not the owner, an order made by the county court is enforced by the appointment of a receiver of the rents and profits of the lands; but if the occupier is a lessee who was liable to pay the tithe rent-charge under a contract made before the passing of the Act (26th March, 1891), the owner can recover the amount from him by distress; and the tithe rent-charge is also recoverable by distress against an owner who is the occupier. In such cases the distress is made under sect. 81 of the Act of 1836, but, since the amount recoverable is the sum ordered to be paid by the county court, the limitation fixed by sect. 10 (2) is operative; that is, only arrears which have become due within two years before the commencement of the proceedings in the county court are recoverable.

Scope of the Tithe Act, 1891.

The Tithe Act, 1891, extends to any expenses, rent-charge, or other sums which, by any enactment in the Tithe Acts or the Extraordinary Tithe Redemption Act, 1886, are directed to be recovered as tithe rent-charge (sect. 10 (4)): see Leach on The Tithe Acts, 5th ed. p. 165; and consequently to such sums the two years' limit applies. But it does not extend to tithe rent-charge issuing out of lands of a railway company (sect. 10 (11)), and the special power of distress for such tithe rent-charge, when apportioned against the railway company's lands, given by the Railway Clauses Act, 1845 (7 & 8 Vict. c. 85), s. 22, expressly extends to "all arrears." Apparently, therefore, such arrears must be taken to be excepted from sect. 42 of the R. P. L. A., 1833, and no limitation is applicable.

Annuities and periodical sums charged on land.

Annuities charged on land fall within the definition of "rent" in sect. 1 of the Act of 1833 (*supra*, p. 27), and hence under the present section only six years' arrears can be recovered: *Francis* v. *Grover* (1845), 5 Hare, 39; *Ferguson* v. *Livingston* (1846), 9 Ir. Eq. R. 202. And where a principal sum is charged on land, and is payable by instalments, the instalments are "rent," and the arrears recoverable are limited

accordingly: *Uppington* v. *Tarrant* (1861), 12 Ir. Ch. R. 262. An annuity given by will, which forms no charge on land, is not within sect. 42: *Roch* v. *Callen* (1848), 6 Hare, 531; *Re Ashwell's Will* (1859), Johns. 112; though the fact that it is charged on personal estate as well as on land does not save it from the bar of the section: *Re Nugent's Trusts* (1885), 19 L. R. Ir. 140.

Limit only applies in favour of person liable to pay the rent.

Sect. 42 applies only to the recovery of rents as between the person entitled to the rent and the person liable to pay. When land is recovered by the rightful owner against an adverse occupier, the profits recoverable are subject to the six years' limitation on actions of trespass (*infra*, p. 193); and where title is established against a person who has been in adverse receipt of rents, the rents are recoverable in an action for money had and received, and are subject to the six years' limitation on that action (*infra*, p. 188). Similarly the special limit on arrears of tithe rent-charge only applies to recovery by the tithe rent-charge owner. Where the tithe rent-charge has been paid to the tithe owner under a mistake of fact, as, for instance, in respect of lands which are not in the possession of the person making the payment, the payer can recover sums so paid within six years of action, notwithstanding that the tithe rent-charge owner has lost his remedy against the person who ought to have paid: *Durrant* v. *Ecclesiastical Commissioners* (1880), 6 Q. B. D. 234.

Limitation only bars the remedy.

Sect. 42 only limits the arrears of rent in proceedings brought for their recovery. It does not extinguish the title to arrears beyond the six years. Hence a jointress in receipt of the rents and profits of land, who is underpaid during one tenancy, can, upon the land being relet at an increased rent, retain out of the rents all the arrears of jointure, though for a period exceeding six years: *Battersby* v. *Rochfort* (1847), 10 Ir. Eq. R. 439. And a tenant who comes to the Court for relief from forfeiture for non-payment of rent can only have it upon the terms of paying the full arrears. The ground of the relief is that the proviso for re-entry is in the nature of a security for rent: see Stirling, J., in *Howard* v. *Fanshawe*, [1895] 2 Ch. 581; C. L. P. A., 1852 (15 & 16 Vict. c. 76), s. 210; see *Courtenay* v. *Parker* (1864), 16 Ir. Ch. R. p. 337.

Extinguishment of title to property bars all

But the extinguishment of title to the property which produces the rent extinguishes also the title to recover arrears. Thus, where a title to a rent-charge is extinguished, the right to

arrears of rent.

recover any arrears is gone: *Jones* v. *Withers* (1896), 74 L. T. 572, C. A. And though an express trust will save the title to the rent as a hereditament, sect. 10 of the R. P. L. A., 1874 (*supra*, p. 162), prevents it from saving the title to arrears. Hence if the rent would, in the absence of a trust, be extinguished, no arrears can be recovered: *Hughes* v. *Coles* (1884), 27 C. D. 231. And where a yearly tenant has held over for the statutory period without payment of rent, the landlord, upon his title being thus extinguished, cannot recover arrears of rent for any part of such period: *Re Jolly*, [1900] 2 Ch. 616, C. A.

Section III.—Arrears of Interest.

(1) *Interest on Mortgages, Judgments, and Legacies.*

Interest on mortgage moneys and legacies.

Sect. 42 of the R. P. L. A., 1833 (*supra*, p. 174), imposes a six years' limitation on the recovery of arrears of interest "in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy," and this limit applies, therefore, in the cases of mortgages and charges on land, and of legacies whether charged on land or not. The right to share in the proceeds of real estate constitutes an interest in land, and is included under the term "land" by virtue of the definition clause (sect. 1) of the Act of 1833. Hence a sum secured by mortgage of such proceeds is within sect. 42, and arrears of interest on it are limited to six years: *Bowyer* v. *Woodman* (1867), 3 Eq. 313. And a mortgage of a canal with the works and rates is within the section, since it gives a charge on land: *Hodges* v. *Croydon Canal Co.* (1840), 3 Beav. 86; but not a mortgage of turnpike tolls: *Mellish* v. *Brooks* (1840), 3 Beav. 22.

Interest on judgments.

The words "any sum of money charged upon or payable out of any land or rent," have been construed as expressing shortly the fuller category in sect. 40—"any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent at law or in equity." At the date of the Act of 1833 judgments were at least potentially a charge on land, so as to justify the extension of sect. 42 to all judgments: *Kelly* v. *Bodkin* (1841), 3 Ir. Eq. R. 390; *Henry* v. *Smith* (1842), 2 Dr. & War. 381; and this construction is not varied because subsequent legislation has from time to time varied the exact mode in which satisfaction of the judgment out of land can be enforced:

see *Jay* v. *Johnstone* (1893), 1 Q. B. 189, C. A. (*supra*, p. 165). The limitation applies to statutory interest on judgments, notwithstanding that the statutes allowing interest—the Judgments Act, 1838 (1 & 2 Vict. c. 110, s. 17); in Ireland, 3 & 4 Vict. c. 105, s. 26—are subsequent to the R. P. L. A., 1833: *Henry* v. *Smith* (*supra*). Hence interest on all judgments, whether they are actually charged on land or not, is limited to six years.

Six years reckoned before proceedings.

The period of six years for which interest is allowed is reckoned back from the commencement of the proceedings in which it is claimed: *Francis* v. *Grorer* (1845), 5 Hare, p. 49; *Hughes* v. *Williams* (1852), 3 Mac. & G. 683. As to claims made against an estate which is being administered by the Court, *vide infra*, p. 316.

No interest if principal barred.

The claim to interest depends on the right to recover the principal, and is barred with it: *Clark* v. *Alexander* (1844), 8 Scott N. R. 147; but the six years' limit may apply to a claim for interest, although the statute is, under the circumstances, excluded as to the principal: *Re Walker* (1871), 7 Ch. 120; see *Thompson* v. *Eastwood* (1877), 2 App. Cas. 215.

An express trust does not now extend the time as to interest on sums of money and legacies charged on land: R. P. L. A., 1874, s. 10 (*supra*, p. 162); but it is otherwise as to legacies payable out of personal estate; *supra*, p. 173.

(2) *Where Prior Incumbrancer in Possession.*

Effect of possession by prior incumbrancer.

The limitation on the recovery of arrears of interest is excluded as regards a subsequent incumbrancer, where a prior incumbrancer has been in possession; and the subsequent incumbrancer may recover arrears for the whole period of such possession, provided he brings his action within a year of its cessation:—

R. P. L. A., 1833, s. 42: proviso.

> "Provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years."

Application of the proviso.

This proviso corresponds in its scope with sect. 40 (now sect. 8 of the Act of 1874), and with the earlier part of sect. 42, and it applies where a judgment creditor has the first security upon the land and goes into possession: *Henry* v. *Smith* (1842), 2 Dr. & War. p. 390. The possession of an incumbrancer on a life estate does not enable an incumbrancer on the remainder in fee to recover more than six years' arrears, since the latter, having no right to enter, is not prejudiced by such possession: *Vincent* v. *Going* (1844), 1 Jo. & Lat. 697. An equitable incumbrancer, on whose behalf the legal estate was held, was treated in *Drought* v. *Jones* (1840), 2 Ir. Eq. R. 303, as retaining his priority for the purpose of the proviso, although he had agreed to postpone his charge in favour of a subsequent incumbrancer, but the case is of doubtful authority (Sugden's R. P. Stat., p. 146, n. (*x*)). A purchaser, who takes an assignment of a satisfied charge, does not go into possession as an incumbrancer, so as to enable a subsequent incumbrancer to recover more than six years' arrears of interest: *per* Lord Westbury, C., in *Chinnery* v. *Evans* (1864), 11 H. L. C. p. 137.

Arrears only given by proviso during prior possession.

The saving in favour of the subsequent incumbrancer, as the words of the proviso clearly show, gives him arrears only during the time of the prior incumbrancer's possession; not for any period previous to such possession: *Montgomery* v. *Southwell* (1843), 2 Con. & Law, p. 268.

(3) *Reversionary Interests.*

Mortgage of reversionary interest in real estate.

In general, no extension of time in respect of arrears is allowed, because the mortgaged estate is reversionary. The principle of the proviso to sect. 42 applies, indeed, to such a case, but it does not fall within its words: *Vincent* v. *Going* (1844), 1 Jo. & Lat. pp. 702, 703; *Sinclair* v. *Jackson* (1853), 17 Beav. 405; *Smith* v. *Hill* (1878), 9 C. D. 143. These authorities outweigh the contrary decision of Wood, V.C., in *Wheeler* v. *Howell* (1857), 3 K. & J. p. 201.

Reversionary interest in personal estate.

The statute is not applied by way of analogy to interests in personality, and in proceedings under a mortgage of a reversionary interest in personalty the mortgagee is not restricted to six years' arrears: *Mellersh* v. *Brown* (1890), 45 C. D. 225; *Clarkson* v. *Henderson* (1880), 14 C. D. 348. And similarly where a vendor has a lien on such an interest for unpaid purchase money: *Re Stucley*, [1906] 1 Ch. 67, C. A.; though if the

mortgage covers realty as well as personalty, it is indivisible, and the bar in respect of the realty applies also in favour of the personalty: *Charter* v. *Watson*, [1899] 1 Ch. 175.

Proviso for redemption on death of tenant for life.

But, under the special terms of a mortgage of a reversionary interest in land, the interest may not be in arrear till it falls into possession; and then the limitation on "arrears" does not apply: *Re Lambert's Estate*, [1906] 1 I. R. 220, C. A. Thus where the proviso for redemption entitles the mortgagor to redeem on or before the death of the tenant for life on payment of the principal sum "with interest for the same in the mean time" at a specified rate, the interest for the purpose of the proviso is not deemed to be in arrear till the death, and the mortgagee is entitled to be paid without regard to any limitation on arrears. And this is so notwithstanding that the mortgage contains a covenant for payment of interest half-yearly, during the life of the tenant for life. The proviso for redemption and the covenant are independent of each other: *Re Turner*, [1894] 43 W. R. 153.

Legacies not paid till reversionary interest got in.

Legacies are expressly included in sect. 42, but if the executors, acting for the benefit of the estate, wait for a reversionary interest to fall into possession instead of selling it, legatees, who in consequence have to wait for payment, have been allowed interest from the end of one year after the testator's death, although this exceeds six years: *Re Blachford* (1884), 27 C. D. 676.

(4) *Interest in Redemption and Foreclosure Actions.*

Distinction between redemption and foreclosure.

The six years' limitation only applies where the person claiming interest is seeking to recover it by action or other direct proceeding, and hence a distinction has been made between the arrears which are allowed upon redemption and upon foreclosure. Formerly the right of the mortgagee to require payment of arrears beyond six years before redemption was based on the doctrine of tacking. To the six years to which he was entitled under the R. P. L. A., 1833, he was allowed, in order to avoid circuity of action, to tack the additional fourteen years which, upon the doctrine of *Hunter* v. *Nockolds* (1850), 1 Mac. & G. 640 (*supra*, p. 156), he could recover in an action on the covenant; provided that the person seeking to redeem was the mortgagor or his heir or beneficial devisee, so that the right to tack the specialty debt existed: Fisher on Mortgages, 5th ed.,

p. 553; and hence, in *Elry* v. *Norwood* (1852), 5 De G. & Sm. 240, the mortgagee was allowed twenty years' arrears of interest in a redemption suit brought by the heir of the mortgagor: *cf. Sinclair* v. *Jackson* (1853), 17 Beav. 405. On the other hand, in a foreclosure suit, since it was the mortgagee who was taking steps to enforce his security against the land, he was restricted to six years' arrears: *Sinclair* v. *Jackson* (1853), 17 Beav. 405; *Shaw* v. *Johnson* (1861), 1 Dr. & Sm. 412; *Round* v. *Bell* (1861), 30 Beav. 121. This view prevailed over the opinion expressed by Wigram, V.C., in *Du Vigier* v. *Lee* (1843), 2 Hare, 326, and *Kemp* v. *Sober* (1847), 6 Hare, 155, that, alike in redemption and in foreclosure, only six years' arrears could be obtained.

Mortgagee is only barred in proceedings taken by himself.

But it is unnecessary to have recourse to the doctrine of tacking. The removal of the limitation on arrears in redemption actions is based on the consideration that sect. 42 only applies where the mortgagee is seeking to recover arrears of interest by "distress, action, or suit." It applies, therefore, to a foreclosure action; but a redemption action is not an action brought by the mortgagee, and in such action sect. 42 imposes no limitation on the arrears to which he is entitled, nor is any limitation imposed in such a case by 3 & 4 Will. 4, c. 42, supposing this to be operative as to arrears of interest (*infra*, p. 184); though after twenty years payment would be presumed. Hence the rule is, that since, in a redemption action, the mortgagee is not himself taking any proceeding to recover arrears of interest, there is no limitation on his claim except that supplied by the presumption of payment after twenty years, and the mortgagor, therefore, who can only redeem on payment of all sums due under the mortgage, will have to pay the arrears for that period: *Dingle* v. *Coppen*, [1899] 1 Ch. 726.

Proceeds of sale in hands of the mortgagee.

The same rule applies also wherever the mortgagee is able to make the mortgaged property available for satisfaction of his debt without himself taking proceedings which attract the bar of sect. 42. This happens, for instance, where the mortgagee has sold the property under his power of sale. In an action brought by the mortgagor to recover the surplus proceeds, the mortgagee can retain the full interest due, although it goes beyond six years. The contrary decision given by Romilly, M.R., in *Mason* v. *Broadbent* (1863), 33 Beav. 296, has been overruled by *Edmunds* v. *Waugh* (1866), 1 Eq. 418, *Re Marshfield* (1887), 34 C. D. 721, and *Dingle* v. *Coppen*, [1899] 1 Ch. 726.

Proceeds of sale in Court on behalf of mortgagee.

In *Edmunds* v. *Waugh* (*supra*) the trustees of the will of the mortgagee had sold the property and paid the proceeds into Court in an administration action. It was held that the fund was still constructively in the hands of the trustees, and upon a petition by them for payment out of arrears of interest, they were not restricted to the six years' limit. The petition was not in the nature of a suit to recover interest under sect. 42, but was a means of giving effect to the trustees' right of retention.

Proceeds of sale in Court for persons entitled.

But where the fund is in Court, not on behalf of the mortgagee solely, but on behalf of all parties interested, the position of the mortgagee as regards arrears of interest is the same as in respect of the land. If it is he who takes proceedings for payment out, he is treated as if he were seeking to recover interest, and he is limited to six years' arrears; where, for instance, land has been taken under the Land Clauses Act, and the purchase money paid into Court: *Re Stead's Mortgaged Estates* (1876), 2 C. D. 713. And where land has been sold in Ireland on an incumbrancer's petition, another incumbrancer, who comes in and avails himself of the proceedings, is in the same position as if he were bringing an action, and he can claim no arrears beyond six years prior to his coming in: *Re Owen Lewis's Estate*, [1903] 1 I. R. 348. But where the petition is presented by the mortgagor or persons claiming through him, the mortgagee is in the position of a defendant, and the petitioners are only entitled to the balance after the mortgagee has received his principal and full arrears of interest: *Re Lloyd*, [1903] 1 Ch. 385, C. A.; overruling *Re Slater's Trusts* (1879), 11 C. D. 227. If, however, the mortgage debt is barred and the mortgagee's title extinguished, he cannot make use of this doctrine to claim either principal or arrears of interest: *Re Hazeldine's Trusts*, [1908] 1 Ch. 34, C. A.

Section IV.—Limitation on Personal Remedies for Arrears of Rent and Interest.

Action on covenant. Twenty years arrears formerly recoverable.

Sect. 42 of the R. P. L. A., 1833 (3 & 4 Will. 4, c. 27), imposes a general limitation of six years in any distress or action brought to recover arrears of rent or interest on money charged on land; while sect. 3 of the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42) imposes a limitation of twenty years on actions

for rent upon an indenture of demise and on actions of covenant for specialty debts, the result being that, under the latter enactment, twenty years' arrears of rent and of interest would be recoverable. The Civil Procedure Act was held to operate in respect of this limitation by way of exception from sect. 42 the R. P. L. A., so that twenty years' arrears were recoverable in an action on the indenture of demise or the specialty, while in any other proceeding the arrears were limited to six years: *Hunter* v. *Nockolds* (1850), 1 Mac. & G. 640; *Manning* v. *Phelps* (1854), 10 Ex. 59; *supra*, p. 156. The Civil Procedure Act did not apply to Ireland, but sect. 20 of the Irish Common Law Procedure Act, 1853 (16 & 17 Vict. c. 113), enacted a twenty years' limitation for actions on indentures of demise and on specialties, and also on judgments; so that in that country the exception extended to arrears of interest recovered in an action on a judgment. It is unnecessary to refer to the intermediate Irish legislation: *cf. Harrison* v. *Duignan* (1842), 2 Dr. & War. 295; S. C. *Kyne* v. *Dignan*, 4 Ir. Eq. R. 562; and its sequel, *Byrne* v. *Duignan* (1845), 3 Jo. & Lat. 116, 9 Ir. Eq. R. 295; *supra*, p. 165.

Effect of *Sutton* v. *Sutton*.

The extent to which this result has been altered by sect. 8 of the R. P. L. A., 1874, and by the construction placed on that section in *Sutton* v. *Sutton* (1882), 22 C. D. 511, C. A., has not been clearly settled. Sect. 8 touches principal sums charged on land and judgments, and operates to repeal, as regards them, the twenty years' limitation on personal actions contained in sect. 3 of the Civ. Proc. Act, 1833, and in sect. 20 of the Irish C. L. P. A., 1853 (*supra*, p. 157). If this construction applies to principal sums only, then arrears of interest are left to be governed by the previous law, and in an action on the covenant twenty years' arrears of interest could still be recovered: *cf. Strachan* v. *Thomas* (1840), 12 A. & E. 536; *Elcy* v. *Norwood* (1852), 5 De. G. & Sm. 240. Sects. 40 and 42 of the R. P. L. A., 1833, distinguish between sums of money charged upon land and interest in respect of such sums, and sect. 8 of the Act of 1874 in reproducing sect. 40 must be taken to use "sum of money" in the same sense. Consequently sect. 8 imposes no express bar on arrears of interest which did not before exist. Moreover, although no action can be brought for the principal sum after twelve years, yet the principal debt is not extinguished, and the arrears of interest for twenty years would still be

recoverable. And similarly in Ireland, twenty years' arrears of interest could be recovered in an action on a judgment, though the judgment debt was barred in twelve years, and it was so held in *Breslin* v. *Hodgens* (1876), Ir. R. 10 Eq. 260.

Implied repeal of exception as to arrears of interest.

But it is difficult to treat the implied repeal of sect. 3 of the Civil Procedure Act, 1833, and of sect. 20 of the Ir. C. L. P. A., 1853, as being confined to principal sums. These sections impose a twenty years' limitation on actions on specialties and on judgments, without distinguishing between principal and interest, and if sect. 8 of the R. P. L. A., 1874, has impliedly repealed them as to principal sums, it is a natural conclusion that they are repealed also as to interest. The interest follows the principal, and it cannot have been intended to repeal the exception so far as it was favourable to principal, and to leave it intact so far as it was favourable to interest. Under the earlier statutes just mentioned the exception was a single exception in favour of actions on specialties, though it operated as regards both principal and interest, and if it is gone as to principal, it is gone, too, as to interest. The same considerations apply in Ireland as to interest on judgments.

Arrears of interest now recoverable only for six years.

If this view is correct, it remains to consider whether the arrears are now subject to a twelve years' limitation under sect. 8 of the Act of 1874, or to a six years' limitation under sect. 42 of the R. P. L. A., 1833. But sect. 8, as just pointed out, does not limit arrears of interest, and, if it were possible to hold that it did, there would be the anomalous result that in proceedings against the land the arrears would be limited to six years under sect. 42, and in proceedings on the covenant they would be limited to twelve years under sect. 8; in other words, sect. 8 would have the effect of perpetuating, with a change from twenty years to twelve years, the exceptional mode of treating arrears which, as just suggested, it was intended to abolish. This result is inadmissible, and it may be taken that the effect of the implied repeal of sect. 3 of the Civil Procedure Act, 1833, and sect. 20 of the Ir. C. L. P. A., 1853, is to leave sect. 42 of the R. P. L. A., 1833, as the one enactment governing arrears of interest on sums of money charged on land and judgments, so that in all proceedings the arrears are limited to six years. Porter, M.R., so decided in *M'Donnell* v. *Fitzgerald*, [1897] 1 I. R. 556, as to arrears of interest on judgments in Ireland, and he declined to follow *Breslin* v. *Hodgens* (1876), Ir. R. 10 Eq. 260. It is

believed that this is the correct view, also, as to interest on specialty debts charged on land.

Arrears of rent-charge recoverable only for six years.

A similar question as to the effect of sect. 8 of the R. P. L. A., 1874, arises in regard to rents charged on land and also secured by covenant. Prior to that Act six years' arrears of the rent were recoverable against the land and twenty years' arrears in an action on the covenant: *supra*, p. 156. The rent is within sect. 1 of the Act of 1874 and sect. 34 of the Act of 1833, and is now liable to be barred in twelve years and the title to it extinguished, and when this has happened, no arrears can be recovered at all: *supra*, p. 28. Hence the arrears are in any case limited to twelve years. But *primâ facie* they are subject to the six years' limit of sect. 42 of the R. P. L. A., 1833; they can only obtain more favourable treatment on the ground that each annual or other periodical payment is a sum secured by personal covenant and recoverable as a specialty debt within the limit assigned by sect. 3 of the Civil Procedure Act, 1833. If they were so recoverable, the limit would be shortened from twenty to twelve years by sect. 8 of the Act of 1874; but, in fact, the implied repeal of sect. 3 of the Civil Procedure Act, 1833, as regards actions to recover specialty debts charged on land must extend to successive payments of a rent-charge, and in the result these are left to the six years' limitation of sect. 42 of the R. P. L. A., 1833.

Rent on lease by deed recoverable for twenty years.

As regards rent reserved on an indenture of demise the case stands differently. Such rent is within neither sect. 40 of the R. P. L. A., 1833, nor sect. 8 of the Act of 1874, and in sect. 3 of the Civil Procedure Act, 1833, and sect. 20 of the Ir. C. L. P. Act, 1853, it stands as a separate item from specialty debts. There is no ground for saying that the implied repeal of these sections as to specialty debts charged on land extends to the quite different matter of rents on indentures of demise, and as to these the former law remains. Twenty years' arrears are recoverable in an action on the indenture, while only six years' arrears are recoverable against the land; and it has been so held both in England and Ireland: *Darley* v. *Tennant* (1885), 53 L. T. 257; *Donegan* v. *Neill* (1885), 16 L. R. Ir. 309; *cf.* *Graham* v. *Lewis* (1885), 80 L. T. Newsp. 66.

Summary as to arrears of rent and interest.

At present, therefore, the law appears to stand as follows:—

(1) Interest on sums of money charged on land and on judgments is limited to six years in all proceedings.

(2) Arrears of rent-charges secured by covenant are limited to six years in all proceedings.

(3) Arrears of rent reserved on an indenture of demise can be recovered for twenty years in an action on the indenture, but only for six years in other proceedings.

It is assumed that the proceedings are instituted by the creditor. His right of retention is not limited to the six years' period: *supra*, p. 182.

Section V.—Account of Rents and Profits.

(1) *At Law.*

Trespass for mesne profits.

A claim for recovery of land is usually accompanied by a claim for an account of rents and profits. Where A., the person entitled, is wrongfully kept out of possession, the actual occupier, B., may either be occupying on his own account, or as tenant to a third person, C., who is the real adverse possessor, and to whom B. pays rent. In either case the former remedy of A. was first to recover in ejectment, and then to bring trespass for mesne profits. The recovery in ejectment was evidence of his title from the day of the demise laid in the declaration, but for any antecedent period special proof of title had to be given: Adams on Ejectment, p. 342. The judgment for recovery of possession was against B., the actual occupier, and he was liable in the action for mesne profits. But where he had been let into possession by C., and C. had continued to sanction his possession by receipt of rent, C. also was considered as a trespasser, and might be joined as a defendant: *Doe* v. *Harlow* (1840), 12 A. & E. 40. The action of trespass for mesne profits was subject to the limitation on trespass in the Limitation Act, 1623, and the plaintiff could recover only the rents for six years before action brought (Buller's N. P. 88), unless he was entitled to an extension of time on account of disability: *Hicks* v. *Sallitt* (1854), 3 D. M. & G. 782 (see p. 802).

Recovery of rent wrongfully received.

Where there is a valid lease subsisting, but the lessee, B., pays the rent to C., instead of to A., the person entitled to receive it, the payment is no discharge to B., and A. may recover the rent against him; but such claim is subject to the limitation of sect. 42 of the R. P. L. A., 1833, and only

six years' arrears are recoverable. Instead, however, of proceeding against B., A. may claim against C. the rents which he has wrongfully received. Such a claim will be in an action for money had and received, and, being an action of *assumpsit*—that is, case—will be subject to the six years' limitation under the Limitation Act, 1623. The recovery of the rents in this manner will discharge B. from liability to A.: Buller's N. P. 133; Chitty on Pleadings, 112; *cf. Moses* v. *Macferlan* (1760), 2 Burr. 1005; *Boyter* v. *Dodsworth* (1796), 6 T. R. 681; *Gledhill* v. *Hunter* (1880), 14 C. D. 492, at p. 495.

Joinder of claim to recover land and claim for mesne profits.

In actions for recovery of land or for declaration of title to land, the claim in the action can now include a claim for mesne profits: R. S. C., 1883, Ord. 18, r. 2; *Gledhill* v. *Hunter* (*supra*); but the change in the form of the action does not affect the operation of the Statute of Limitations (*Gibbs* v. *Guild* (1882), 9 Q. B. D. p. 67, C. A.), and the period for recovery of rents is limited to six years before action, as formerly in an action of trespass for mesne profits, or in an action for money had and received.

(2) *In Equity.*

Account of rents in equity:

Where an account of rents and profits is ordered in equity it may be: (1) without limit, for the whole of the period since the plaintiff's title accrued; (2) for six years before action; or (3) only for the period since the action was commenced. The account is directed without limit where the circumstances are such that there is no statutory limit applicable, either expressly or by way of analogy, and where there is no reason for equity to impose a special limit of its own. This is the case (1) where the claim is founded on an express trust or upon fiduciary relationship (see as to a committee of a lunatic, *Wright* v. *Chard* (1859), 4 Drew. p. 680; and as to guardian and ward, *Mathew* v. *Brise* (1851), 14 Beav. 341), and is not limited by the Trustee Act, 1888; (2) where the plaintiff was an infant when his title accrued, and sues within six years of attaining twenty-one (see *Lockey* v. *Lockey* (1719), Prec. Chan. 518, referred to in *Knox* v. *Gye*, L. R. 6 H. L. p. 674); and (3) where the assistance of equity is invoked upon the ground of fraud, misrepresentation, or concealment: *Dormer* v. *Fortescue* (1744), 3 Atk. 124; *Stackpoole* v. *Davoren* (1780), 1 Bro. P. C. 9; *Hicks* v. *Sallitt* (1854), 3 D. M. & G. 782. *Cf. Hood* v. *Easton* (1856), 2 Jur. N. S. 729,

(1) Without limit.

917, as to accounts against a mortgagee, who has permitted mines to be worked by a stranger, and against such stranger. See, too, *Monypenny* v. *Bristow* (1832), 2 R. & M. 117.

(2) For six years.

Where, on the other hand, the suit is subject expressly or by way of analogy to the statutory bar of six years, this limit is adopted in equity; and hence, if the account is sought in equity because the limitations are equitable, or if proceedings are taken in equity in aid of a legal title, the account is limited to six years before action: *Reade* v. *Reade* (1801), 5 Ves. p. 749; *Gibbon* v. *Snape* (1863), 1 D. J. & S. 621; *Hickman* v. *Upsall* (1876), 4 C. D. 144, C. A.; and none the less because the defendant holds under trustees: *Hercy* v. *Ballard* (1793), 4 Bro. C. C. 468. But where this statutory limit is not applicable, and there are special reasons for favouring the defendant, equity imposes a shorter limit than at law, and the account is not carried back beyond the commencement of the action. Thus where the account would *primâ facie* be unlimited, but the defendant is a *bonâ fide* adverse possessor—that is, where he had no notice of the plaintiff's title—then the account is limited to the commencement of the proceedings: *Dormer* v. *Forteseue* (*supra*); *Hicks* v. *Sallitt* (*supra*). And it is the same if the plaintiff, although he would *primâ facie* be entitled to an unlimited account, has forfeited this right by his laches: *Dormer* v. *Forteseue* (*supra*); see *Harmood* v. *Oglander* (1801), 6 Ves. 199, p. 225. Even in a case of express trust the delay of the plaintiff may be a ground for limiting the account to the commencement of the action: *Smith* v. *Smith* (1876), 1 L. R. Ir. 206, C. A.

(3) From commencement of action.

Right to account saved by infancy.

It is doubtful whether in the case of an infant it is necessary, for the purpose of carrying the account back without limit, to rely upon the doctrine stated in *Dormer* v. *Forteseue*, namely, that one who enters on the estate of an infant enters as a guardian or bailiff of the infant. It is preferable to regard the Limitation Act, 1623, as applying by way of analogy, and then the plaintiff's rights are saved during his disability and for six years after: *Hicks* v. *Sallitt* (*ubi supra*), *per* Turner, L.J., at pp. 816, 817. If this is so, it follows that the defendant cannot rely upon his *bonâ fide* possession in order to restrict the account to the commencement of the action.

Extent of rule in favour of a

In the judgment just referred to, Turner, L.J., stated the rule in favour of the *bonâ fide* adverse possessor in such terms as to

bonâ fide possessor.

extend apparently to all proceedings in equity. "In cases of adverse possession, where there is no trust, no infancy, no fraud, no suppression, where, in short, there is a mere *bonâ fide* adverse possession, it is not according to the course of the Court to carry back the account of rents beyond the filing of the bill." But probably this rule only applies to cases where the Court is not guided by the analogy of the statute. If the account is one to which the statutory six years' limit would properly apply, it will not be limited to the commencement of the action because the defendant is a *bonâ fide* possessor. This special limit is only imposed in cases where a Court of Equity is not subject expressly or by analogy to the legal limitation. Where the statutory limit applies, the defendant cannot escape accounting for six years' rents and profits on the ground of his *bonâ fides:* see *Hickman* v. *Upsall* (*supra*).

Produce rents.

Where rent is payable in produce, such as minerals, it accrues for the purpose of account at receipt of the produce, not at its subsequent sale: *Denys* v. *Shuckburgh* (1840), 4 Y. & C. Ex. 42.

CHAPTER IV.

ACTIONS OF CONTRACT AND TORT.

SECTION I.—GENERAL RULES OF LIMITATION.

(1) *Simple Contract and Tort.*

Statute of James.

UNDER the Limitation Act, 1623 (21 Jac. 1, c. 16), actions founded on simple contract and tort are barred in six years from the accrual of the cause of action; except actions of assault and battery and actions for false imprisonment, which are barred in four years, and actions of slander, which are barred in two years:—

Limitation Act, 1623, s. 3.

Six years' limitation in simple contract and tort.

"All actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action *sur trover*, and replevin for taking away of goods and cattle, all actions of account and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rents, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, which shall be sued or brought at any time after the end of this present session of Parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after: (that is to say) the said actions upon the case (other than slander), and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said action of trespass *quare clausum fregit*, within three years next after the end of this present session of Parliament, or within six years next after the cause of such actions or suit, and not after; and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within one year next after the end of this present session of Parliament, or within four years next after the cause of such actions or suits, and not after; and the said actions upon the case for words, within one year after the end of this present session of Parliament, or within two years next after the words spoken, and not after."

The Act does not apply to Ireland. For the corresponding Irish statute, see *infra*, p. 197.

Actions limited by the statute.

The following table shows the actions enumerated in the statute of James, and the limitations respectively assigned to them :—

Actions enumerated	*Limitations imposed.*
Trespass *qu. cl. fr.*	Case (except slander) . six years.
Trespass.	Account . . . . ,,
Detinue.	Trespass . . . . ,,
Trover.	Debt . . . . ,,
Replevin.	Detinue . . . . ,,
Account (other than merchants' accounts).	Replevin . . . . ,,
Case.	Trespass *qu. cl. fr.* . . ,,
Debt on lending.	Assault, battery, wounding, and imprisonment . four years.
,, on contract without specialty.	Case for words . . . two years.
,, for arrears of rent.	
Assault, menace, battery, wounding, and imprisonment.	

Old forms of action.

The old actions of tort were: trespass, detinue, trespass on the case (or, shortly, case), and replevin. Trover was a form of case. The actions of contract were debt and *assumpsit*, the latter being a form of case. The action of account was introduced to prevent the waste of time that would have been involved in submitting current accounts to a jury in an action of *assumpsit*. The judgment was that the defendant should account—*Quod computet*—before a master or auditor: Gilb. Law of Evidence, p. 192: *Scott* v. *M'Intosh* (1809), 2 Camp. 238. But the action fell into disuse: Lee, Dict. of Pract., 1825, p. 8.

Actionable wrongs.

The various wrongs for which these forms of action provided a remedy may be grouped as follows:—

Wrongs.	*Remedy.*
1. *Wrongs to the person.*	
Direct injury: assault and battery . . .	Trespass.
Indirect injury: negligence	Case.
Injury to health: nuisance	,,
Injury to reputation: slander, libel, malicious prosecution	,,
Interference with liberty: false imprisonment .	Trespass.
2. *Wrongs to property.*	
Real property.	
Unlawful entry upon land	Trespass *qu. cl. fr.*
Other wrongs, such as nuisance, waste, disturbance of franchise, common, or ways . .	Case.

Wrongs.	*Remedy.*
Wrongs to property—continued.	
Personal property.	
Unlawful taking	Replevin, trespass (or, by election, trover).
Unlawful detainer	Detinue (with judgment for specific return), trover.
Deceit causing loss	Case.
Failure of sheriff in duty upon an execution .	,,
Abuse of property	Trespass or case
Infringement of copyright, patent, or trade-mark	Case.
3. *Injuries in private relations.*	
Husband and Wife.	
Abduction	Trespass.
Enticing away	Case.
Master and servant.	
Enticing away; seduction	Case.
4. *Breach of simple contract*	Debt, assumpsit, account.

Limitation applies notwithstanding abolition of old forms of action.

All these actions are enumerated in the first column of the above table (*supra*, p. 192), and, in different order, are repeated in the second column, with the exception of trover, which, however, is included under case: *Swayne* v. *Stephens* (1631), Cro. Car. 245. Trespass includes an action for mesne profits: Bull. N. P. 88; *Reade* v. *Reade* (1801), 5 Ves. 744. Hence the section imposes a general limitation on actions of tort and simple contract, and the prescribed periods of limitation still apply, notwithstanding that the forms of action with reference to which they were imposed have been abolished. "I am of opinion," said Brett, L.J., in *Gibbs* v. *Guild* (1882), 9 Q. B. D. p. 67, "that the Judicature Act, 1873, did not alter or touch the Statute of Limitations at all, and that that statute still applies to the circumstances which constituted the actions named in it; that is to say, that if the circumstances would have constituted an action on the case, or an action of trespass, although the action which involves the remedy sought would not now be called an action on the case or an action of trespass, yet, notwithstanding, the Statute of Limitations applies to it, if the facts are such as would have supported an action on the case or an action of trespass." A six years' limitation was imposed on seamen's wages by 4 & 5 Anne, c. 3: *infra*, p. 245.

(2) *Specialty Debts.*

Specialty debts, etc.

By the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42) (which does not apply to Ireland), a limitation of twenty years was imposed on actions for rent reserved by lease under seal and for specialty debts; and limitations were provided for certain actions which had been omitted from the Limitation Act, 1623.

Civ. Proc. Act, 1833, s. 3.

Twenty years' limitation on specialty debts.

"All actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or scire facias upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any fieri facias, and all actions for penalties, damages, or sums of money given to the party grieved, by any statute now or hereafter to be in force, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant or debt upon any bond or other specialty, actions of debt or scire facias upon recognizance, within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, within two years after the cause of such actions or suits, but not after; and the said other actions within six years after the cause of such actions or suits, but not after; provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited."

Before this statute there was no limitation in England in respect of specialty debts other than that arising from presumption of payment after the lapse of twenty years. The Irish statute is mentioned subsequently: *infra*, p. 197.

Thus:—

Actions of debt for rent due upon a lease under seal „ „ covenant or debt upon any bond or other specialty „ „ of debt or *scire facias* upon any recognizance	Are barred in 20 years.
Actions of debt on an award where the submission is not by specialty „ „ for copyhold fines „ „ for an escape „ „ for money levied on a *fi. fa.*	Are barred in 6 years.
Actions for penalties given by statute to the party grieved	Are barred in 2 years.

Rent reserved by lease under seal.

An action of debt for rent reserved by lease under seal was not within the Limitation Act, 1623: *Freeman* v. *Stacey* (1630), Hutt. 109. The effect of the twenty years' limitation is that arrears can be recovered by action for the whole of that period, though the remedy by distress is limited by sect. 42 of the R. P. L. A., 1833, to six years' arrears: *supra*, p. 174.

Instrument under seal.

The twenty years' limit applies whenever the debt arises upon an instrument under seal; and since the Statute of Limitations is a matter of procedure, such a debt can be sued on within twenty years in this country, although it was contracted in a country where the distinction between simple and specialty debts is not recognized, and where all are barred alike in a period less than twenty years: *Alliance Bank* v. *Carey* (1880), 5 C. P. D. 429; *vide infra*, p. 213. A liability on shares in a company governed by deed of settlement is a specialty debt: *Re Portsmouth Banking Co.* (1866), 2 Eq. 167. A recital of a simple contract debt in a deed does not necessarily imply a fresh contract under seal to pay it, so as to exclude the six years' limit. To produce this result there must be an intention that the deed shall operate by way of agreement to pay: *Iven* v. *Elwes* (1854), 3 Drew. 25.

Tithe rent-charge.

A "specialty" implies an obligation *inter partes*, and hence a claim to a tithe rent-charge is not a claim founded on specialty: *Conolly* v. *Gorman*, [1898] 1 I. R. p. 37.

Liability under statute.

A liability arising under statute is within the words "or other specialty," and is not barred till twenty years have run. This is so with respect to calls on shares arising by virtue of the Companies Clauses Act, 1845, and a special Act: *Cork & Bandon Ry. Co.* v. *Goode* (1853), 13 C. B. 826; *Shepherd* v. *Hills* (1855), 11 Ex. p. 67; or under the Companies Act, 1862, since sect. 16 makes the calls a specialty debt: *Buck* v. *Robson* (1870), 10 Eq. 629; and, generally, where the cause of action is statutory: see *Magherafelt Union* v. *Gribben* (1889), 24 L. R. Ir. 520 (as to liability for seeds supplied under the Seed Supply (Ireland) Act, 1880); *Nichols* v. *Regent's Canal Co.*, [1894] 63 L. J. Q. B. 641 (as to liability of a company to pay costs under statute); *Re Cornwall Minerals Ry. Co.*, [1897] 2 Ch. 74 (as to liability of a company to pay interest on stock issued under the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118)). But where a statute merely gives a right to payment out of a particular fund the remedy is by action on the case, and the six years' limit applies:

Mayor of Salford v. *Lancashire County Council* (1890), 25 Q. B. D. 384, C. A.

Dividends.

Payments due from a company in pursuance of its articles of association to members, to whom share certificates have been issued under the company's seal, are due under specialty, and the limitation is twenty years; such as payments in respect of dividends: *Smith* v. *Cork & Bandon Ry. Co.* (1870), Ir. R. 5 Eq. 65, C. A.; *Re Drogheda Steam Packet Co.*, [1903] 1 I. R. 512; *Re Artisans' Land, etc., Corporation*, [1904] 1 Ch. 796; or in respect of return of money upon a reduction of capital: *Re Artisans' Land, etc., Corporation.* Probably the result would be the same, although no certificates are issued, since the articles have statutory sanction and rank as a deed as between the company and the members: Comp. Act, 1862, s. 16; *Smith* v. *Cork & Bandon Ry. Co.* (*supra*). In respect of dividends declared on shares, time runs from the date of the declaration: *Re Severn, etc., Ry. Co.*, [1896] 1 Ch. 559; *Re Artisans' Land, etc., Corporation;* and in respect of capital to be returned on shares, from the date of the notice of the order of the Court confirming the reduction: *Re Artisans' Land, etc., Corporation.* But the company will lose the benefit of the statute if it appropriates assets to meet the claim, or puts itself in the position of a trustee for the shareholders: *Re Severn, etc., Ry. Co.*

Return of capital.

Warrant of attorney.

A simple contract debt does not cease to be such because it is secured by warrant of attorney, and it remains subject to the six years' limitation: *Clarke* v. *Figes* (1817), 2 Stark. 234.

Specialty debts charged on land.

Where a debt secured by specialty is also charged on land, an action on the specialty is barred in twelve years under the R. P. L. A., 1874, s. 8, *supra*, p. 154. Where it is charged on a reversionary interest, either in real or personal estate, the fact that the remedy on the specialty is barred when the interest falls into possession does not prevent the mortgagee from then recovering such interest by virtue of the assignment to him: *supra*, p. 160. But when there is a mortgage on a present interest, and the mortgagee's right of action has been barred and his title to the mortgaged property extinguished, he cannot rely upon his still existing specialty debt as a ground for obtaining payment of the debt out of proceeds of the mortgaged property in Court in proceedings taken by the mortgagor to get the fund out of Court: *Re Hazeldine's Trusts*, [1908], 1 Ch. 34, C. A.

Actions on awards, etc.

Actions of debt upon any award where the submission is not by specialty; for any fine due in respect of any copyhold estates; for an escape; and for money levied on any fieri facias, were not within the statute 21 Jac. 1, c. 16. Where the submission was under hand and the award under seal, the action was excluded either as being on a specialty or because it was not an action of debt "grounded upon any lending or contract": *Hodsden* v. *Harridge* (1670), 2 Wms. Saund. ed. 1871, p. 150; 1 Lev. 273. Debt for a copyhold fine was adjudged not to be within the statute: see *per* Twisden, J., in 1 Lev. 273; and debt against the sheriff for money levied on a *fi. fa.* was excluded as being on the footing of matter of record: *Cockram* v. *Welbye* (1680), 2 Show. 79. An action of debt for an escape was founded on statute, namely, 1 Ric. 2, c. 12, and, therefore, was not within 21 Jac. 1, c. 16: *Jones* v. *Pope* (1667), 1 Saund. 37; though, if the action was brought in case, the six years' limit applied: Wms. Saund. ed. 1871, p. 61.

All these matters were made subject to the six years' limitation by sect. 3 of the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42). The cause of action for a copyhold fine accrues on the admittance of the tenant: *Monckton* v. *Payne*, [1899] 2 Q. B. 603.

As to actions for penalties, *vide infra*, p. 240.

(3) *Irish Statutes.*

Limitations in Ireland.

The Irish statutes corresponding to the Statute of James and 4 & 5 Anne, c. 3, were 10 Car. 1. sess. 2, c. 6 (Ir.) and 6 Anne, c. 10 (Ir.). A twenty years' limitation on specialty debts was enacted for that country by 8 Geo. 1, c. 4 (Ir.): see *Re Greene's Estate* (1884), 13 L. R. Ir. p. 477, C. A.; *Vincent* v. *Willington* (1842), Long. & T. p. 462. This statute was superseded and repealed by Pigot's Act (3 & 4 Vict. c. 105), s. 32, as explained by 7 & 8 Vict. c. 90, s. 39. And ultimately 10 Car. 1, sess. 2, c. 6, 6 Anne, c. 10, and sect. 32 of Pigot's Act were repealed by the Irish C. L. P. A., 1853 (16 & 17 Vict. c. 113), and corresponding limitations for simple contract and specialty debts, and also for tort, were enacted by sect. 20 of that statute. They may be stated as follows:—

Actions.	*Limitations.*
Rent on indenture of demise Bond or other specialty Judgment, statute staple, statute merchant, or recognizance	20 years.
Lending or contract, express or implied, without specialty Award where submission is not by specialty Money levied on *fi. fa.* Account (other than merchants' accounts) Direct injuries to real or personal property Taking away, detention, or conversion of property, goods, and chattels Libel, malicious prosecution and arrest, seduction, criminal conversation Other actions which would formerly have been trespass on the case, "except as hereinafter excepted"	6 years.
Assault, menace, battery, wounding, and imprisonment	4 years.
Slander Penalties, damages, or sums of money given to the party grieved	2 years.

The section concludes with a provision that "with respect to every cause of action not herein specifically provided for, being the subject-matter of a personal action, such actions in respect thereof shall be brought within the same period of limitation now applicable thereto, notwithstanding that such cause of action may be described or expressed in such statutes by reference to any particular form of action." These general words keep alive the limitation on actions to recover copyhold fines, which are not expressly mentioned. It will be noticed that the section extends to judgments, as regards which, however, it is impliedly repealed by the R. P. L. A., 1874, s. 8, (*supra*, p. 165).

(4) *Extension of Time where Action is abortive.*

Extension of time where action abortive.

The Limitation Act, 1623, allowed further time in certain cases where an action originally brought within the six years had proved abortive:—

Limitation Act, 1623, s. 4. New action allowed within a year

> "If in any of the said actions or suits judgment be given for the plaintiff, and the same be reversed by error; or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he

take nothing by his plaint, writ, or bill; or if any of the said actions shall be brought by original, and the defendant therein be outlawed and shall after reverse the outlawry; in all such cases the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after."

A similar provision is contained in sect. 6 of the Civil Procedure Act, 1833 (3 and 4 Will. 4, c. 42), as to specialty debts, but the part of this latter section relating to outlawry was repealed by the Statute Law Revision (No. 2) Act, 1888 (51 & 52 Vict. c. 57). The corresponding Irish provision, which makes no mention of the case of outlawry, is sect. 21 of the Irish C. L. P. A. 1853 (16 & 17 Vict. c. 113).

How action formerly became abortive.

Thus sect. 4 of the Act of 1623, and sect. 6 of the Civil Procedure Act, 1833, in its original form, allowed a further time of one year in cases where the plaintiff's action was abortive either (i.) because a judgment in his favour was reversed on error, or (ii.) because, after a verdict in his favour, motion was made in arrest of judgment, and judgment was given against him, or (iii.) because the defendant failed to appear and was outlawed. Outlawry in civil proceedings had fallen into disuse before 1879, when it was abolished by sect. 3 of the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59). Procedure in error was abolished by R. S. C., 1875, Ord. 58, r. 1, and appeals to the Court of Appeal are now by way of rehearing: see *Quilter* v. *Mapleson*, 1882, 9 Q. B. D. 672, C. A. Motions in arrest of judgment are also obsolete, and the practice as to obtaining and setting aside judgments is regulated by R. S. C., 1883, Ord. 40. Under the present system the judgment as finally entered operates as a bar to further proceedings, so that the above sections have ceased to have any direct operation.

Death of party.

But by an equitable construction they have been extended to the case where the action is abated by the death of the plaintiff or defendant, and the plaintiff or his personal representatives, as the case may be, are then allowed to bring a new action within a reasonable time, notwithstanding that the six years have elapsed. This additional period is computed, in the case where the plaintiff has died, from the death, and

where the defendant has died, from probate of his will or grant of administration (see *per* Lopes, L.J., in *Swindell* v. *Bulkeley* (1886), 18 Q. B. D. 250, at p. 255), and in general it is fixed at a year in analogy to sect. 4: *Kinsey* v. *Heyward* (1699), 1 Ld. Raym. 432; 2 Wms. Saund., notes to *Hodsden* v. *Harridge*, Ed. 1871, p. 173. But the time is not necessarily thus limited, and it will be extended for good cause, as where there has been a difficulty in constituting a personal representative: *Curlewis* v. *Mornington* (1857), 7 E. & B. 283, in Ex. Ch., 27 L. J. Q. B. 439; *Sturgis* v. *Darell* (1859), 4 H. & N. 622, 6 H. & N. 120, decided on sect. 3 of 3 & 4 Will. 4, c. 42. And such new action may still be brought, although, by virtue of R. S. C., 1883, Ord. 17, r. 1, the original action does not now abate upon the death of any of the parties: *Swindell* v. *Bulkeley* (*supra*).

Former extension of time by marshalling.

It was at one time considered that simple contract creditors against the estate of a deceased person might, under certain circumstances, gain an extension of time against the land under the doctrine of marshalling. This was when the specialty creditors, who alone had a remedy against the land, had resorted to the personalty. The simple contract creditors were thus deprived of their proper fund, and were consequently allowed to stand in the place of the specialty creditors against the land, and, moreover, they were allowed for this purpose the twenty years' limitation appropriate to specialty debts: *Vickers* v. *Oliver* (1842), 1 Y. & C. C. C. 211; *Ellard* v. *Cooper* (1850), 1 Ir. Ch. R. 376; but see *Busby* v. *Seymour* (1844), 1 Jo. & Lat. 527. But now that simple creditors have a direct remedy against the real estate, the reason for this application of the doctrine of marshalling has gone, and the corresponding extension of time has gone with it: *Fordham* v. *Wallis* (1852), 10 Hare, p. 230.

Section II.—Accrual of Cause of Action.

Accrual of cause of action.

In slander the statute runs from the time when the words are spoken; in other matters from the time when the cause of action arises. When the injury in itself gives a right to damages without proof of actual loss, the cause of action arises upon the happening of the injury. This is the case where the injury is a direct infringement of a right or is a breach of

contract. When the injury is not actionable save on proof of actual loss—or, as it is usually put, when damage is the gist of the action—the cause of action does not arise until the happening of the actual loss. And in a third class of actions the conduct causing the damage only becomes wrongful if actual loss results, and here again the cause of action arises upon the happening of the loss.

(1) *Where the Action lies without Proof of Actual Damage.*

Personal rights.

An infringement of personal rights—that is, rights to bodily security, to reputation, and to liberty—gives an immediate right of action without proof of special damage, the law in such cases imputing general damage; save only in slander, if the words spoken are not actionable *per se*. The statute runs accordingly upon the occurrence of the event—such as an assault, the publication of a libel, or an imprisonment—which constitutes the infringement. In slander, if the words are not actionable *per se*, time runs from the special damage: *infra*, p. 203. False imprisonment gives a continuing cause of action, and an action will lie in respect of so much of the imprisonment as has occurred within four years, but the defendant may plead the statute as to the earlier imprisonment: *Coventry* v. *Apsley* (1692), 2 Salk. 420; *Bailey* v. *Warden* (1815), 4 M. & S. 400; *Hardy* v. *Ryle* (1829), 9 B. & C. 603. Where, however, the defendant did not cause the imprisonment, but prevented the release more than four years ago, the action against him is barred: see *Violett* v. *Simpson* (1857), 8 E. & B. 344.

Rights of property.

Similarly, infringements of rights of property give an immediate cause of action. In the case of trespass, if the trespass is an isolated act, the statute runs from the trespass, and if this is more than six years old, the action is barred: *Clegg* v. *Dearden* (1848), 12 Q. B. 576; *cf. Wordsworth* v. *Harley* (1830), 1 B. & Ad. 391, where under a special statute time ran from the "fact committed." If the trespass is continuing, then a fresh cause of action is continually arising: see *Holmes* v. *Wilson* (1839), 10 A. & E. 503; and damages can be recovered in respect of so much of the trespass as has occurred within six years. A nuisance is immediately actionable without proof of special damage, and the statute runs forthwith, if it constitutes a direct infringement of a

right; as where a commoner enjoys more than his share of the commonable rights: *Wells* v. *Watling* (1779), 2 W. Bl. 1233; note to *Marys' Case* (1613), 9 Rep. 113 *a*. As to conversion of personal property: *vide infra*, p. 222.

Breach of simple contract.

Where an action is brought upon a contract, it is the breach of contract, and not the promise, which gives the cause of action. "The rule is firmly established that in *assumpsit* the breach of contract is the cause of action, and that the statute runs from the breach, even where there is fraud on the part of the defendant": *East India Co.* v. *Paul* (1849), 7 Moo. P. C. C. 85, at p. 111; see *Gould* v. *Johnson* (1702), 2 Salk. 422; and *per* Lord Mansfield in *Fenton* v. *Emblers* (1762), 3 Burr. p. 1281. Thus, where there is a promise to do a thing on request, the action arises on the request and not on the promise: *Webb* v. *Martin* (1662), 1 Lev. 48; *Buckler* v. *Moor* (1672), 1 Mod. 89; *Shutford* v. *Penow* (1629), Cro. Car. 139.

Subsequent special damage.

And the statute runs forthwith upon the breach, though special damage may accrue later. "In an action of *assumpsit*, the Statute of Limitations begins to run, not from the time when the damage results from the breach of promise, but the time when the breach of promise takes place": *Howell* v. *Young* (1826), 5 B. & C. 259, *per* Bayley, J., at p. 265. The breach of contract is the gist of the action, not the special damage: *Battley* v. *Faulkner* (1820), 3 B. & A. 288.

Breach of specialty contract.

Similarly, in the case of breach of covenant, the cause of action accrues upon the breach being complete, and the statute thereupon begins to run, notwithstanding that special damage occurs subsequently; though if the breach is continuing, it furnishes from day to day a fresh cause of action, and the covenantee can recover damage suffered within twenty years before action. Where a bond is conditioned for the performance of a series of acts at stated times—as for payment of successive instalments of money—a new cause of action arises upon each default, and the obligee can recover in respect of breaches committed within twenty years before action: *Amott* v. *Holden* (1852), 18 Q. B. 593; see *Sanders* v. *Coward* (1846), 15 M. & W. 48.

Covenants for title.

A covenant for good right to convey is finally broken if a defect of title exists at the time of conveyance, and the statute thereupon runs. "It is not what is called a continuing breach, any more than not paying money is a continuing breach": *per* Bramwell, B., in *Spoor* v. *Green* (1874), L. R. 9 Ex. 99, at

p. 111; *Turner* v. *Moon*, [1901] 2 Ch. 828. But if the grantee dies within six years of the conveyance, and damage does not arise until after his death, the right of action devolves on the devisee and not on the personal representative: *Kingdon* v. *Nottle* (1813), 1 M. & S. 355; (1815), 4 M. & S. 53, as explained by Bramwell, B., in *Spoor* v. *Green;* see *Turner* v. *Moon*. A covenant for quiet enjoyment is not broken till disturbance, and the twenty years run from that event: *Spoor* v. *Green* (*loc. cit.*, p. 111). But there can be no breach until the interest to which the covenant relates is in existence; thus if it relates to a future term, there can be no breach till the commencement of the term in possession: *Ireland* v. *Bircham* (1835), 2 Scott, 207.

Continuing breach.

A breach of a covenant to keep in repair is a continuing breach, and furnishes from day to day a new cause of action so long as the breach lasts: *Spoor* v. *Green* (*loc. cit.*). Consequently the lessor can recover damages suffered within twenty years before action: see *Maddock* v. *Mallett* (1860), 12 Ir. C. L. R. 173, 193; *Morrogh* v. *Alleyne* (1873), Ir. R. 7 Eq. 487. But a covenant to do specified work is broken once for all when the work is not done at the stipulated time: *Morris* v. *Kennedy*, [1896] 2 I. R. 247, C. A.

1914, 2 Ch. 516

(2) *Where Special Damage must be proved.*

Statute runs from the damage.

Where the cause of action lies, not in a specific act or omission, but in the resulting damage, the statute runs from the time when the plaintiff sustains the loss: *Whitehouse* v. *Fellowes* (1861), 10 C. B. N. S. 765. And this is the case where the conduct of the defendant does not directly infringe any absolute right, personal, proprietary, or contractual, but in fact results in actionable loss to another. Thus, in actions of slander, while there is a special limitation of two years from the words spoken if these are actionable *per se*, yet for other words the special damage furnishes the cause of action, and gives the date from which time runs—in this case six years: *Saunders* v. *Edwards* (1663), 1 Sid. 95; *Browne* v. *Gibbons* (1702), 1 Salk. 206; *infra*, p. 236. Where negligence occurs in the course of the fulfilment of a contract, it is regarded as a breach of contract, and the statute runs forthwith. But, otherwise, negligence does not itself give a cause of action. To be actionable it must be followed by actual damage, and the

Slander.

Negligence.

statute runs from the happening of the damage. It is the same with an action founded upon a nuisance which interferes with the convenient enjoyment of property, but does not constitute a direct infringement of a proprietary right: *supra*, p. 201; with seduction (see *Marys' Case* (1613), 9 Rep. 113 *a*), and with barratry: *Hibbert* v. *Martin* (1808), 1 Camp. 538. In these cases the damage is the gist of the action, and there is no complete cause of action, and the statute does not run until loss ensues.

Nuisance.
Seduction.
Barratry.

Continuing injury.

In general damage must be recovered once for all, and the judgment in the action covers future prospective damage as well as past known damage. Hence the future damage, when it occurs, gives no fresh cause of action. But if the wrongful conduct is in its nature continuing, and is accompanied from time to time by fresh damage, it gives a recurring right of action, and damage can be recovered which has accrued within six years and which has not been already satisfied. Thus a continuing nuisance gives a continually recurring right of action (*Battishill* v. *Read* (1856), 18 C. B. 696), provided there is a recurrence of special damage to support the action. In *Whitehouse* v. *Fellowes* (1861), 10 C. B. N. S. 765, an alteration of a drain in a highway caused successive floods on adjacent land. "No fresh cause of action," said Williams, J., at p. 784, "arises from each fresh damage, but where there is not only a fresh damage, but a continuance of the cause of damage, such continuance of the wrongful act which caused the damage constitutes a fresh cause of action." (*Cf.* note (*j*) to *Hodsden* v. *Harridge*, 2 Wms. Saund. ed. 1871, p. 166.) Similarly in *Dorery* v. *Grand Canal Co.* (1875), Ir. R. 9 C. L. 194, a wrongful obstruction of a stream, commenced and causing damage in 1866, was continued to 1873, when it caused the flooding of the plaintiff's land. This was held to give a fresh cause of action in 1873.

(3) *Where the Damage is the Sole Cause of Action.*

Damage by subsidence.

Where land or houses are entitled to support from adjacent or subjacent property, the mere excavation in such property, although possibly prejudicial to the right of support, is not wrongful. If, however, the excavation results in subsidence whereby actual damage is caused, the damage gives a cause of

action (*Backhouse* v. *Bonomi*, 1858, 9 H. L. C. 503), and the statute runs from the damage and not from the excavation. And since the damage is the sole cause of action, the judgment covers only the damage already suffered, and a fresh cause of action arises with every successive subsidence: *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127. And the damages given in any action cover only the physical damage up to that action. They cannot be extended to cover depreciation in the market value of the property due to apprehension of additional damage in the future: *West Leigh Colliery Co.* v. *Tunnicliffe & Hampson, Ltd.*, [1908] A. C. 27. The new cause of action, however, is against the person whose working caused the subsidence, and if his liability is not enforceable, in consequence of his death or otherwise, the plaintiff loses his remedy. He cannot recover damages from other persons in occupation when the subsidence occurs upon the ground that they have done nothing to prevent it: *Greenwell* v. *Low Beechburn Coal Co.*, [1897] 2 Q. B. 165; *Hall* v. *Duke of Norfolk*, 48 W. R. 565. If the damage is continuous, the action lies for such part as has occurred within the six years: *cf. Fairbrother* v. *Bury Sanitary Authority* (1889), 37 W. R. 544; *Crumbie* v. *Wallsend Local Board*, [1891] 1 Q. B. 503, C. A.

Section III.—Matters affecting the Operation of the Statute.

(1) *A Person to Sue.*

A person to sue.

If at the time when a cause of action would arise there is no person capable of suing upon it, the statute does not commence to run. Until there is a person to sue, the cause of action does not fully accrue, and the operation of the statute is postponed accordingly.

Administrator.

Hence, if a cause of action in favour of the estate of an intestate arises after his death, the statute does not run until the grant of administration: *Murray* v. *East India Co.* (1821), 5 B. & A. 204; *Perry* v. *Jenkins* (1836), 1 My. & Cr. 118; *Atkinson* v. *Bradford Building Society* (1890), 25 Q. B. D. 377, C. A.; though, upon such grant being made, the title of the administrator relates back to the death: *Tharpe* v. *Stallwood* (1843), 5 Man. & Gr. 760; *Foster* v. *Bates* (1843), 12 M. & W.

226; see *Saffyn* v. *Adams* (1602), Cro. Jac. 61; *Cary* v. *Stephenson* (1695), Salk. 421. With regard to actions for the recovery of land a different rule is laid down by sect. 6 of the R. P. L. A., 1833, and the statute runs as though there was no interval between the death and the grant: *supra*, p. 51.

Executor.

Probate is not necessary to constitute the title of an executor; it is only evidence of the title. Property vests in the executor immediately on the death (*Woolley* v. *Clark* (1822), 5 B. & A. 744), and he can commence an action before probate. Hence time runs against him immediately upon the cause of action accruing. Where probate is granted of a forged will, and is afterwards revoked and administration granted, "the statute runs against the administrator only from the grant to him": *Chan Kit San* v. *Ho Fung Hang*, [1902] A. C. 257, P. C.

(2) *A Person to be Sued.*

A person to be sued.

It is also necessary that there shall be a person to be sued. Hence, where a cause of action arises against the estate of an intestate, the statute does not run till administration is granted. Similarly, since an action cannot be brought against an executor till he either proves or intermeddles, the operation of the statute is correspondingly postponed: *Webster* v. *Webster* (1804), 10 Ves. 93; *Flood* v. *Patterson* (1861), 29 Beav. 295. "A cause of action," said Best, C.J., in *Douglas* v. *Forrest* (1828), 4 Bing. 686, "is the right to prosecute an action with effect; no one has a complete cause of action until there is somebody that he can sue." Where an action was founded on fraud not discovered till after the defendant's bankruptcy, since it could not be brought during the bankruptcy, the statute did not run until the bankruptcy was annulled: *Re Crosley* (1887), 35 C. D. 266, C. A. And as long as an ambassador of a foreign sovereign is protected by his office from the issue of a writ, the statute does not run against his creditors: *Musurus Bey* v. *Gadban*, [1894] 2 Q. B. 352, C. A.; see *Magdalena Steam Navigation Co.* v. *Martin* (1859), 2 E. & E. 94.

Where the holder of a promissory note payable on demand, who had taken it as executrix, was a married woman, and her husband was one of the three joint makers, so that she was unable to sue during his lifetime, it was held that it survived to her on his death as a chose in action not reduced into

possession, and she could sue the other makers within six years from that event: *Richards* v. *Richards* (1831), 2 B. & Ad. 447.

(3) *Running of Statute is Continuous.*

The statute once started runs without interruption.

If there are competent parties when the cause of action accrues, so that the statute begins to run, it then continues running notwithstanding any subsequent impediment to bringing an action. The statute once started suffers no check: *M'Donnell* v. *Broderick*, [1896] 2 I. R. 136, C. A. It continues to run, therefore, although a party comes under disability. "It is a well-known and settled rule, that, where the time has once begun to run, no subsequent disability, however involuntary, will suspend their operation": *Homfray* v. *Scroope* (1849), 13 Q. B. p. 512. Or although a party has died intestate. No extension is allowed in respect of delay in taking out administration (*Rhodes* v. *Smethurst* (1840), 6 M. & W. 351; *Freake* v. *Cranefeldt* (1838), 3 My. & C. 499; *Howlett* v. *Lambert* (1840), 2 Ir. Eq. R. 254), or by reason of an executor not acting: *Penny* v. *Brice* (1865), 18 C. B. N. S. 393. And where a husband would be liable for an ante-nuptial debt of his wife, the statute runs in his favour from the accrual of the cause of action against the wife; not from the date of the marriage (*Beck* v. *Pierce* (1889), 23 Q. B. D. 316), although the husband's liability only commences then.

(4) *Suspension of Remedy.*

Union of parties.

If, however, while the statute is running, the person to sue and the person to be sued become the same, its operation is suspended: *cf. supra*, p. 86. Thus where a debtor takes out administration to his creditor, the running of the statute is suspended during the administration. The administration, being an act of law, is not an extinction of the debt, but a suspension of the remedy: *Seagram* v. *Knight* (1867), 2 Ch. 628. And where a debt due from an executor is statute-barred after the testator's death, but before probate, the subsequent taking out of probate, since it relates back to the death, saves the debt and makes it assets in the executor's hands: *Ingle* v. *Richards* (1860), 28 Beav. 366.

Formerly proceedings in equity

Before the fusion of jurisdiction in equity and common law, effected by the Judicature Acts, it was possible that a plaintiff

might exclude statute at common law.

might be restrained in equity from asserting his claim at law until the statutory period had elapsed. In such a case the Court would prevent the plaintiff from being prejudiced by the delay (*Pulteney* v. *Warren* (1801), 6 Ves. 73; *O'Donel* v. *Browne* (1810), 1 Ball & B. 262), and would give him an equitable remedy equivalent to that of which the interposition of the Court had deprived him: *Brown* v. *Newall* (1837), 2 My. & Cr. 558; *cf.* *Fyson* v. *Pole* (1838), 3 Y. & C. Ex. 266; as to the limits of the principle see *East India Co.* v. *Campion* (1837), 11 Bl. N. S. 158, p. 187; and see *Baylee* v. *Browne* (1847), 10 Ir. Eq. R. 180.

And though the court of equity had not actually restrained proceedings at law, yet the pendency of a suit properly brought in equity stopped time from running, so that if it were found necessary to take proceedings at law in aid of the proceedings in equity, the defendant was not allowed to set up the statute: *Sturt* v. *Mellish* (1743), 2 Atk. 610, p. 615; *Bond* v. *Hopkins* (1802), 1 Sch. & Lef. 413, p. 432; *Sirdefield* v. *Price* (1827), 2 Y. & J. Ex. 73; *Supple* v. *Cann* (1858), 9 Ir. C. L. R. 1. Thus if ejectment was directed after the statute had run, the defence of the statute was excluded: *Blennerhassett* v. *Day* (1812), 2 Ball & B. 104. Or the effect of the proceedings in equity might be to vest a new equitable title under the decree in the plaintiff: *Bond* v. *Hopkins* (*loc. cit.* p. 436). But this result did not follow if the proceedings had been wrongly brought in equity, the plaintiff's sole remedy being at law. Consequently a bill in chancery depending for six years did not save the statute as regards a simple contract debt: *Lake* v. *Hayes* (1736), 1 Atk. 281; *contra*, *Anon.* (1682), 1 Vern. 73. Inasmuch as the same Court now disposes of both legal and equitable rights affecting the subject of claim, such cases as the above have ceased to be of practical importance.

Agreement not to plead statute.

An agreement that a mutual account shall be taken without regard to the Statute of Limitations has been held to be an agreement for valuable consideration and enforceable: *Lade* v. *Trill* (1842), 6 Jur. 272. But in general a defendant is not debarred from pleading the statute by an agreement not to do so, though the agreement, if supported by consideration, will give a new ground of action: *Reeves* v. *Hearne* (1836), 1 M. & W. 323; *East India Co.* v. *Paul* (1849), 7 Moo. P.C. C., p. 112; or might be made the subject of a counterclaim, and be disposed of in the plaintiff's action: Judicature Act, 1873 (s. 24 (3)).

Deed of arrangement.

It has been held that a covenant in a deed of arrangement that the creditor shall not sue the debtor during its currency operates to suspend the statute until the period contemplated by the deed has elapsed: *O'Brien* v. *Osborne* (1852), 10 Hare, 92; *Iveu* v. *Elwes* (1854), 3 Drew. 25; *cf. Fuller* v. *Redman* (*No.* 2) (1859), 26 Beav. 614. But this is opposed to the principle that the statute once started, continues to run without interruption—save in the case of union of the parties by act of law (*supra*, p. 207)—and the correct rule appears to be that, upon a debtor arranging with his creditors for payment of their debts in a particular manner, there is an implied promise by him to pay the whole debt in the event of default under the deed, and upon default a fresh cause of action arises upon this promise; though as a matter of pleading it is sufficient if the creditor sues on the original debt: *Irving* v. *Veitch* (1837), 3 M. & W. 90; *Re Stock* (1896), 66 L. J. Q. B. 146; *M'Donnell* v. *Broderick*, [1896] 2 I. R. 136, C. A. Such an action lies after default: *Edwards* v. *Coombe* (1872), L. R. 7 C. P. 518; *Re Hatton* (1872), 7 Ch. 723; though not before: *Slater* v. *Jones* (1873), L. R. 8 Ex. 186.

Section IV.—Effect of the Statutory Bar.

(1) *Debt not Extinguished.*

Statute only bars remedy.

The Limitation Act, 1623, and the Civil Procedure Act, 1833, do not extinguish the debt, but only bar the remedy. Hence, though the debt cannot be recovered by action if the debtor pleads the statute, nevertheless it remains an existing debt (*Wainford* v. *Barker* (1697), 1 Ld. Raym. 232), and can be made available whenever the creditor has it in his power to set it up without resorting to an action.

Lien enforceable.

Thus, where a creditor has a lien upon goods in his possession, he can retain them until payment, notwithstanding that an action to recover the debt would be barred. "I am of opinion," said Lord Eldon, in *Spears* v. *Hartley* (1800), 3 Esp. 81, "that though the Statute of Limitations has run against a demand, if the creditor obtains possession of goods on which he has a lien for a general balance, he may hold them for that demand by virtue of the lien": *cf. Re Bowes*, W. N. (1889), p. 53. So a solicitor can avail himself of his lien on a judgment obtained for a client (*Higgins* v. *Scott* (1831), 2 B. & Ad. 413), or on papers of his client in his possession (*Re Broomhead*

(1847), 5 D. & L. 52), to obtain payment of costs more than six years old.

Taxation of costs.

Where a solicitor's bill is directed to be taxed for the purpose of ascertaining the amount covered by his lien, the taxation will extend to statute-barred items: *Curwen* v. *Milburn* (1889), 42 C. D. 424, C. A.; and it is the same apparently under every order for taxation. The bill is to be taxed without regard to the statute, leaving to the Court the question whether statute-barred costs should be paid, and under the common order for taxation which contains a submission by the client to pay, the entire costs found due must be paid. If the client wishes to raise the statute, he must do so by applying for a special order: *Re Margetts*, [1896] 2 Ch. 263. But a charging order for costs under sect. 28 of the Solicitors' Act, 1860 (23 & 24 Vict. c. 127), cannot be made as to costs which are statute-barred. The section contains a proviso to this effect.

(2) *Deduction by Executor.*

Retention on account of statute-barred debt as against legatee.

Upon a similar principle, where a pecuniary or a residuary legatee is indebted to the testator's estate, but the debt is statute-barred, the executor can obtain payment of the debt by bringing it into account on paying over the legatee's legacy or share of the residue; in other words, the debt is deducted from the legacy: *Courtenay* v. *Williams* (1844), 3 Hare, 539; *Poole* v. *Poole* (1871), 7 Ch. 17; but not where a legatee under the will of a testator is sole residuary legatee of a debtor to the testator's estate: *Re Bruce*, W. N. [1908], p. 209, C. A. The rule applies also where a share of the estate of an intestate is payable to one of the next-of-kin who is a debtor to the estate: *Re Cordwell's Estate* (1875), 20 Eq. 644; and it enables trustees of a mixed fund, composed of the proceeds of residuary real and personal estate, to deduct a statute-barred debt due from a residuary legatee from the entire share coming to him: *Re Akerman*, [1891] 3 Ch. 212. It was suggested by Kekewich, J., in this last case, that the amount of the debt is not, properly speaking, "retained" under such circumstances. The fund in which the legatee is to share includes the debt, and to that extent he already has his share in hand. But in the case of a specific legacy, since the indebted legatee has no part of this in hand, he is entitled to receive the whole without regard to the

debt: *Ballard* v. *Marsden* (1880), 14 C. D. 374. To hold otherwise would be not deduction or retention, but set-off, which is not permissible where the statute can be pleaded: *Rawley* v. *Rawley* (1876), 1 Q. B. D. 460, C. A. Similarly, executors of a creditor whose debt is statute-barred cannot set this off against damages recovered against them for waste committed by their testator: *Dingle* v. *Coppen*, [1899] 1 Ch. 726. And where there is an intestacy as to a share in a mixed fund, though a debt due from one of the next-of-kin can be deducted from the share of personalty coming to him as next-of-kin, no part can be deducted from the proceeds of real estate which go to him as heir-at-law. Such proceeds are not part of a fund to which the debt contributes: *Re Milnes* (1885), 53 L. T. 534. Where a testator expressly directs that debts due from children shall be deducted from their legacies, the direction extends to statute-barred debts: *Rose* v. *Gould* (1852), 15 Beav. 189.

(3) *Payment by Executor.*

Payment of statute-barred debts by executor.

Since a statute-barred debt is still an existing debt, an executor or administrator is at liberty to pay it (*Re Garratt* (1870), 18 W. R. 684; *Re Rownson* (1885), 29 C. D. p. 362, C. A.), and he may do this although the personal estate is insufficient, so that other debts are thrown on the real estate: *Lowis* v. *Rumney* (1867), 4 Eq. 451. Similarly, a trustee may pay statute-barred costs: *Budgett* v. *Budgett*, [1895] 1 Ch. 202. But this power of paying a debt ceases upon the debt being judicially declared to be statute-barred, and the executor cannot disregard the protection thus formally given to the estate: *Midgley* v. *Midgley*, [1893] 3 Ch. 282, C. A.

Payment after administration order

Upon an order being made for administration, any beneficiary can require the statute to be set up against a creditor who claims to prove in respect of a statute-barred debt: *Shewen* v. *Vanderhorst* (1831), 1 R. & M. 347; 2 R. & M. 75; *Moodie* v. *Bannister* (1859), 4 Drew. 432; and so can another creditor: *Fuller* v. *Redman*, No. 2 (1859), 26 Beav. 614. For this purpose an originating summons, upon which the question of paying a debt arises, has the same effect as an order for administration, and a beneficiary can insist on the statute being set up: *Re Wenham*, [1892] 3 Ch. 59; though not against costs which an executor or trustee has himself incurred: *Budgett* v. *Budgett*, [1895] 1 Ch. 202. But a mere order for an account under

R. S. C. 1883, Ord. 15, r. 1, is not sufficient to take away the executors' right to pay a statute-barred debt: *Re Barrett* (1889), 43 C. D. 70.

Creditor plaintiff in administration.

There is an exception, however, in favour of a creditor at whose suit the order for administration is obtained, and if the executor or administrator has allowed the order to go without setting up the statute against him, this cannot be done afterwards by a beneficiary (*Briggs* v. *Wilson* (1854), 5 D. M. & G. 12), or by another creditor: *Fuller* v. *Redman*, No. 2 (*supra*); *Adams* v. *Waller* (1866), 35 L. J. Ch. 727. This is the plaintiff creditor's reward for undertaking a litigation of which all parties reap the benefit. Similarly, a statute-barred creditor can obtain letters of administration to the debtor's estate: *Coombs* v. *Coombs* (1866), 1 P. & D. 288.

Beneficiary not requiring statute to be set up.

If no beneficiary or creditor requires the statute to be set up in administration proceedings, the executor need not set it up: (*Ex parte Dewdney* (1809), 15 Ves. p. 498), nor will the Court insist on its being set up in favour of absent beneficiaries, if those who are present consent to the debt being paid: *Alston* v. *Trollope* (1866), 2 Eq. 205. After an order for administration, or its equivalent, an executor cannot by acknowledgment revive a debt as against parties interested in the estate: *Phillips* v. *Beal* (1862), 32 Beav. 26.

Retainer by executor.

And just as an executor can pay a statute-barred debt of another person, so he can exercise his right of retainer to pay his own statute-barred debt: *Hill* v. *Walker* (1858), 4 K. & J. 166; and, even after an order for administration, effect will be given to this right as against money paid into Court by the executor (*Stahlschmidt* v. *Lett* (1853), 1 Sm. & G. 415; *Sharman* v. *Rudd* (1858), 4 Jur. N. S. 527), and constructively still in his possession: see *Pulman* v. *Meadows*, [1901] 1 Ch. 233; though a fund in Court, over which he has never had control, will not be paid out to him so as to render it subject to his right to retain a statute-barred debt: *Trevor* v. *Hutchins*, [1896] 1 Ch. 844, C. A. Legatees or next-of-kin cannot defeat this right by setting up the statute: *Clinton* v. *Brophy* (1847), 10 Ir. Eq. R. 139.

Statute set up by some beneficiaries only.

As already intimated, a statute-barred creditor can obtain an order for administration provided the executor does not set up the statute; and such an order can be extended to administration of the real estate, save as to the interests of devisees who are parties, and who set up the statute: *Fordham* v. *Wallis* (1852),

10 Hare, 217. Where some devisees set up the statute and others do not, it has been held that the latter must pay the whole debt out of their shares without any right to enforce contribution from the former: *Fordham* v. *Wallis* (*loc. cit.* p. 231). Since, however, there is a joint liability on the devisees, it is possible that a plea of the statute by one will be available for all: *Morley* v. *Morley* (1855), 5 D. M. & G., p. 625; *Re Lacey*, [1907] 1 Ch. 330, C. A.

(4) *Statute-barred Debts in Bankruptcy.*

Bankruptcy petition by statute-barred creditor.

A statute-barred creditor may present a petition in bankruptcy and obtain a receiving order, if the statute is not set up by the debtor; and no objection can subsequently be taken by a third party to the validity of the proceedings: *Quantock* v. *England* (1770), 5 Burr. 2628 (decided on 5 Geo. 2, c. 30, s. 23, which, like the Bankruptcy Act, 1883, s. 6, requires only an existing debt); but the debtor can object: *Gregory* v. *Hurrill*, (1826), 5 B. & C. 341; *Ex parte Tynte* (1880), 15 C. D. 125. And it would seem that the debt of the petitioning creditor is finally proved on the petition, so as to entitle him to rank for payment in the bankruptcy. But as against other creditors the trustee in bankruptcy is bound to plead the statute, and hence their debts are not capable of proof: *Ex parte Dewdney* (1809), 15 Ves. 479; *Re Clendinning* (1859), 9 Ir. Ch. R. 284; *Re Hepburn* (1884), 14 Q. B. D. p. 400; see *Ex parte Roffey* (1815), 19 Ves. 468. As to creditors not already barred at the commencement of the bankruptcy, the receiving order stops the running of the statute, since the trustee holds in trust for creditors not statute-barred: *infra*, p. 318. A creditor, who has a lien for a statute-barred debt, may exercise his rights under the lien notwithstanding the bankruptcy of the debtor: *Re Hepburn* (*ubi supra*).

(5) *Debts barred by Foreign Statutes.*

Foreign statute of limitations.

Where a foreign statute of limitations bars the remedy only, in the same manner as the Limitation Act, 1623, but does not extinguish the debt, its operation is confined to an action brought in the courts of the foreign state. Even though an action has been brought there and dismissed on the ground of the local Statute of Limitations, yet an action will still lie in this country, if the period of limitation here has not elapsed.

Thus in *Harris* v. *Quine* (1869), L. R. 4 Q. B. 653, an action which had failed in the courts of the Isle of Man, where the limitation was three years, was held to be competent here within six years of the accrual of the cause of action: see *British Linen Co.* v. *Drummond* (1830), 10 B. & C. 903; *Huber* v. *Steiner*, 2 Bing. N. C. 202; *Don* v. *Lippmann* (1837), 5 Cl. & F. 1; (1841), 8 Cl. & F. p. 140; *Alliance Bank* v. *Carey* (1880) 5 C. P. D. 429; Foote's Private International Jurisprudence, 3rd. ed. p. 516. And a creditor's administration action will lie in England in respect of a debt contracted in India, although in that country the debt would be barred by the Indian Statute of Limitations (Art. XIV, 1859): *Finch* v. *Finch* (1876), 45 L. J. Ch. 816. As to the rule where the foreign statute extinguishes the debt, *vide infra*, p. 295. Conversely, where a Scotch creditor, whose claim has been rejected in an English administration as being statute-barred according to the English law, recovers judgment in Scotland where the claim is not barred, a new cause of action arises in England on the Scotch judgment in respect of which the creditor can prove in the administration action: *Re Low*, [1894] 1 Ch. 147, C. A.

Section V.—Effect of the Statute in Particular Actions.

(1) *Accounts.*

Former exception of merchants' accounts.

The exception of merchants' accounts in the Limitation Act, 1623, enabled an action for such an account to be brought at any time, although there had been no item entered for more than six years (*Robinson* v. *Alexander* (1834), 2 Cl. & F. 717), provided there had been no settlement. If there had been a settlement, the lapse of six years was a bar to any proceedings upon the account, just as in the case of an ordinary account (*Farrington* v. *Lee* (1678), 1 Mod. 268). The exception only applied to an action of account properly so called, not to an action of *assumpsit* for the several items of which the account was composed, or for the general balance (*Inglis* v. *Haigh* (1841), 8 M. & W. 769); and it did not apply to mere cross accounts between tradesmen for goods sold, in the absence of an agreement under which the prices were to be treated as items in a mutual account: *Cottam* v. *Partridge* (1842), 4 Man. & Gr. 271.

All actions of account now barred in six years.

Actions for an account, not within the exception of merchants' accounts, were barred if there had been no entry in the account within six years; but where there had been an entry within that time, this was held to imply an acknowledgment of the whole account being open, and a promise to pay the balance when ascertained: *Catling* v. *Skoulding* (1795), 6 T. R. p. 193. But the rule was in effect abolished by sect. 1 of the Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), which required an acknowledgment, save where implied from payment of principal or interest, to be in writing and duly signed: *Cottam* v. *Partridge* (1842), 4 Man. & Gr. 271; and the general limitation upon all actions of account, including merchants' accounts, introduced by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), expressly excludes an extension in consequence of items occurring in the account within the six years:—

Merc. L. A. A. 1856, s. 9. Limitation on merchants' accounts.

> "All actions of account or for not accounting, and suits for such accounts, as concern the trade of merchandise between merchant and merchant, their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits, or, when such cause has already arisen, then within six years after the passing of this Act; and no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter or claim comprised in the same account having arisen within six years next before the commencement of such action or suit."

Period of account.

In *Knox* v. *Gye* (1872), L. R. 5 H. L. 656, at p. 673, Lord Westbury seems to have regarded this provision as aimed at cases where more than six years have elapsed between the last of a series of items and a subsequent entry. But in fact it applies to all items more than six years before action, and prevents them from being revived by subsequent entries, whether within six years of them or no, so as to be recoverable by means of the action. In other words, the section prevents any items more than six years old from being recovered by means of an action of account. It does not follow, however, that such items are to be disregarded in taking the account. In order to ascertain the balance due in respect of items within six years, it is necessary to know how far they have been appropriated in satisfaction of the balance previously due.

Hence the account has to be taken without limit, subject only to the condition that it shall not be carried back beyond a former settlement, and that the final balance shall not include any balance due more than six years before the commencement of the action: *cf.* Darby & Bosanquet, Statute of Limitations, 2nd ed. p. 6. If there is no item within six years the account will not be taken at all.

Re-opening settled account.

When it is said that an account is not to be carried back beyond the last settlement, it is assumed that no ground exists for reopening the settled account. Where errors are shown in a stated account, the account is in general not ordered to be taken again *de novo*, but liberty is given to surcharge and falsify; as to the distinction, see *Pit* v. *Cholmondeley* (1754), 2 Ves. S. 565; and for this purpose one error may be sufficient: *Gething* v. *Keighley* (1878), 9 C. D. 547, p. 550. Where, however, there is a fiduciary relation between the parties, or fraud is proved, or the errors are numerous and important, the whole account will be reopened: *Williams* v. *Barbour* (1877), 9 C. D. 529; *Re Webb*, [1894] 1 Ch. 73, C. A. And a client, who has not had independent advice and who has paid his solicitor's bills without taxation, is entitled to have settled accounts for costs reopened, notwithstanding the lapse of six years, if he can show that there have been overcharges: *Cheese* v. *Keen*, [1908] 1 Ch. 245.

(2) *Action in Rem.*

No statutory bar.

There is no statutory bar to an action *in rem*, save for seamen's wages (*infra*, p. 245). In the Admiralty Division interest is given on damages from the time when the loss was incurred, and is not limited to six years: *The Kong Magnus*, [1891] P. 223.

(3) *Banking Account.*

Current account.

Money held by a bank on current account is not subject to a trust in the customer's favour. It ranks as money lent to the banker, with the superadded obligation that it is to be paid when called for by cheque, and, as in other cases of money lent, the statute runs forthwith without demand. Hence, if there is no actual dealing with the account for six years, the right of the customer to an account (*Foley* v. *Hill* (1844), 1 Phil. 399; (1848) 2 H. L. C. 28), or to recover the amount formerly (or

still) standing to his credit in the bank books (*Pott* v. *Clegg* (1847), 16 M. & W. 321), is barred.

Money on deposit.

Where, however, money is held by a bank on deposit account, although there is still no fiduciary relation in respect of it, yet, since notice of withdrawal must be given before the customer can claim it, the statute does not run till such notice has been given: see *Atkinson* v. *Bradford Building Society* (1890), 25 Q. B. D. p. 380, C. A. And it is the same generally where money is deposited for safe custody, and not as a loan. The statute does not run till actual demand: *Re Tidd*, [1893] 3 Ch. 154.

(4) *Bills of Exchange, Cheques, and Promissory Notes.*

(i.) *Bills of Exchange.*

Cause of action.

A cause of action on a bill of exchange may accrue to the holder against the acceptor, the drawer, and the indorsers, the primary liability being, in case of non-payment of the acceptance, on the acceptor; and also to each indorser against the parties prior to himself whose names appear upon the instrument. But to constitute the cause of action, certain formalities have in general to be complied with, such as presentment for acceptance, presentment for payment, and notice of dishonour, whether by non-acceptance or non-payment; and neglect of these formalities will operate as a discharge, so that the cause of action can never arise. If, however, there has been dishonour and the necessary formalities are complied with, the cause of action is complete, and the statute thereupon runs.

(*a*) *Dishonour by Non-acceptance.*

Presentment for acceptance.

Bills of exchange are payable (1) on demand (which includes bills payable at sight), (2) at a fixed future time, or (3) at a determinable future time (including bills payable at a fixed period after sight): Bills of Exchange Act, 1882 (ss. 3, 10, 11). Presentment for acceptance is needless in class 1. In class 2 it is usual in order that the holder may secure the liability of the drawer, but it is not essential. It is only legally required where the bill is payable after sight—since presentment for acceptance is then necessary to fix the maturity of the instrument—and in certain special cases specified in sect. 39. The holder of a bill payable after sight cannot, however, postpone

the date of payment and so keep alive the liability of the drawer and indorsers, by not presenting it for acceptance. He must either present it for acceptance or negotiate it within a reasonable time; otherwise the drawer and indorsers are discharged: sect. 40.

Dishonour by non-acceptance.

If a bill, whether presentment for acceptance is legally required or not, is not accepted upon presentment, the holder is bound to treat it as dishonoured, and he must at once give notice of dishonour to the drawer and indorsers. If he omits to do so, the drawer or any indorser, to whom notice is not given, is discharged: sect. 48. If he gives the notice, the holder has a right of action against the drawer and each indorser, and the statute forthwith runs in their favour. No fresh cause of action arises upon non-payment when the bill is due: sect. 43 (2); *Whitehead* v. *Walker* (1842), 9 M. & W. 506.

(*b*) *Dishonour by Non-payment.*

Cause of action against acceptor.

When a bill is accepted generally, presentment for payment is not necessary to make the acceptor liable (sect. 52 (1)), though of course such presentment is always in fact made. The cause of action accrues against him after the expiration of the last day of grace: sect. 14; *Kennedy* v. *Thomas*, [1894] 2 Q. B. 759, C. A.; and the statute thereupon begins to run in his favour: *Morris* v. *Richards* (1881), 45 L. T. 210; *cf. Fryer* v. *Roe* (1852), 12 C. B. 437. If the bill is delivered undated, the statute runs from the due date appearing from the bill as afterwards completed: *Montague* v. *Perkins* (1853), 22 L. J. C. P. 187. When a bill is payable at a fixed period after sight, such period is reckoned from presentment for acceptance, and at the end of the period the statute begins to run in favour of the acceptor: *Holmes* v. *Kerrison* (1810), 2 Taunt. 323.

Where presentment for payment required as regards acceptor.

If the acceptance is qualified so as to require presentment for payment, then such presentment is a condition precedent to the liability of the acceptor, and the action does not accrue, or the statute run in his favour, until presentment. As to the time when presentment must be made there is no statutory rule. In the absence of express stipulation, it need not be at the due date of the bill: sect. 52 (2). An unreasonable delay might discharge the acceptor, and possibly the limit for this purpose is six years: *infra*, p. 220.

Cause of action against drawer and indorsers.

Save in the cases where presentment is excused (Bills of Exchange Act, 1882, (s. 46)), due presentment for payment is necessary in order to charge the drawer and indorsers: sect. 45. A bill not payable on demand is duly presented if presented on its due date. A bill payable on demand must be presented within a reasonable time after its issue, in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable: sect. 45 (2). If the bill is not paid, then, in order to fix the drawer and indorsers with liability, notice of dishonour must be given to them in accordance with prescribed rules (sects. 48, 49), and the cause of action arises against each upon his receipt of the notice: *Castrique* v. *Bernardo* (1844), 6 Q. B. 498. Notice of dishonour may be given on the last day of grace, though no cause of action accrues against the acceptor till the expiration of that day: *Kennedy* v. *Thomas*, [1894] 2 Q. B. 759, C. A. As between drawer and indorser time runs in favour of the drawer as from receipt of the notice by him, and not from payment by the indorser at the suit of the holder: *Webster* v. *Kirk* (1852), 17 Q. B. 944.

Where presentment for payment is excused.

If presentment is excused (see sect. 46), the bill is dishonoured by non-payment as soon as it is overdue and unpaid; thereupon notice of dishonour must be sent to the drawer and indorsers, and their liability arises as before on receipt of the notice. But where the bill is payable on demand, it is not overdue till after presentment, and presentment is necessary to raise a cause of action against, and make the statute run in favour of, the drawer and indorsers: *Re Boyse* (1886), 33 C. D. 612. In that case the bill was dated in 1872, and was not presented for payment till 1880. "If," said North, J., "the statute applies at all, it could only run from that date, because there was no liability on the part of the drawer until that time." On this view, the fact that presentment for payment is excused does not give a cause of action without presentment, but prevents the discharge of the drawer and indorsers by the omission to present within a reasonable time. It was held, however, by Stirling, J., in *Re Bethell*, 34 C. D. 561, that, where presentment for payment is excused, it is excused for all purposes, and that the right of action accrues without presentation so soon as the holder is entitled to present the bill—that is, in general, upon the issue of the bill.

(ii.) *Cheques.*

Presentment for payment.

"A cheque is a bill of exchange drawn on a banker payable on demand": Bills of Exchange Act, 1882, s. 73. The cheque must be presented within a reasonable time of indorsement to charge the indorser; that is, it must, in general, be presented or forwarded for presentment on the day after it is received. But failure to present within a reasonable time of issue does not operate as an absolute discharge to the drawer; it discharges him only to the extent of the loss he has suffered by the omission to present, as where the banker, who had assets of the drawer, has failed: Bills of Exchange Act, 1882, s. 74; *cf.* *Laws* v. *Rand* (1857), 27 L. J. C. P. 76; *Robinson* v. *Hawksford* (1846), 9 Q. B. 52. In *Re Bethell* (1887), 34 C. D. 561, Stirling, J., considered that, since a cheque was payable on demand, it was within the rule of *Norton* v. *Ellam* (1837), 2 M. & W. 461, (*infra*, p. 221), with reference to promissory notes, so that time would run forthwith in favour of the drawer without presentment. But the drawer of a cheque is not in the same position as the maker of a note. To fix the drawer and indorsers of a cheque with liability, the cheque must be presented—unless, perhaps, where presentment for payment is excused—and notice of dishonour must be given. Only when this is done, does a cause of action arise against them, and thereupon the statute runs in their favour.

Effect of omission to present.

The omission to present within a reasonable time after indorsement discharges the indorser: sect. 45 (2). The effect as regards the drawer of great delay in presentment is not clear. It has been suggested that six years' delay will discharge him by analogy to the statute: *Laws* v. *Rand* (1887), 27 L. J. C. P. 76; but this use of the statute is misleading. The idea seems to be that the liability on the cheque must in any event cease at the end of six years—that is, either by the liability being discharged or by the action being barred. But such is not the effect. If six years is not too long a delay for presentment, then the action may arise on presentment at the end of six years, and will not be barred for a further similar period. There is no practical reason, however, for this duplication of the statutory period, and the decision of Stirling, J., in *Re Bethell*, though, as just pointed out, open to criticism, seems to be the most convenient solution of the difficulty. The action accrues

upon the issue of the cheque, or, if it is not intended for immediate presentation, so soon as the holder is entitled to present it.

(iii.) *Promissory Notes.*

Presentment for payment necessary as regards indorser.

In general the provisions of the Bills of Exchange Act, 1882, apply to promissory notes, but the maker stands in the position of an acceptor, and the provisions as to acceptance are excluded: sect. 89. Consequently no presentment for acceptance is necessary. Presentment for payment is necessary in order to render an indorser liable, but, to render the maker liable, it is only necessary where the note is expressed to be payable at a particular place: sect. 87.

Not in general as regards maker.

Notes payable on demand.

As regards maker, where presentment not necessary.

Where a note is payable on demand, and presentment is not necessary to charge the maker, it is deemed to be immediately due. No demand is necessary to raise a cause of action, and the statute runs in favour of the maker from the date of the note if it is then issued: *Norton* v. *Ellam* (1837), 2 M. & W. 461; *Jackson* v. *Ogg* (1859), Johns. p. 400; *Re George* (1890), 44 C. D. 627. If it is issued subsequently to its date, the statute runs from the date of issue. Where, for instance, a promissory note, dated and payable on demand, is deposited with a banker to be delivered to the payee on his giving up another note to be cancelled, the cause of action on the new note accrues upon its being received from the bank: *Savage* v. *Aldren* (1817), 2 Stark. 232. And an agreement that no demand shall be made during the life of the maker does not postpone the operation of the statute as regards the note, though a new cause of action for the debt would accrue by virtue of the agreement on the maker's death: *Watkins* v. *Figg* (1863), 11 W. R. 258.

As regards indorser, and as regards maker where presentment necessary.

To charge the indorser of a demand note, the note must be presented within a reasonable time of the indorsement, but in determining what is a reasonable time, regard must be had to the nature of the instrument—whether, for instance, it is issued as a continuing security: *Chartered Bank* v. *Dickson* (1871), L. R. 3 P. C. 574, p. 579—the usage of trade, and the facts of the particular case: sect. 86. Since, in the case of the indorser, presentment is necessary to make him liable, the statute will not run in his favour until presentment followed by notice of dishonour; and where presentment is necessary to charge the maker, *Norton* v. *Ellam* does not apply, and the statute does

not run in his favour till presentment. Thus where the note is payable "at sight," presentment is necessary and the statute does not run in favour of the maker till presentment: *Dixon* v. *Nuttall* (1834), 1 C. M. & R. 307.

Notes payable at fixed date,

Where the note is payable at a fixed date, the statute runs in favour of the maker from such date, allowing for the days of grace, and in favour of an indorser from receipt of notice of dishonour, as in the case of a bill of exchange: *supra*, p. 219; and

or after demand.

where the note is payable at a fixed period after demand or notice or sight, presentment is necessary to start the fixed period, and then the statute runs from the end of the period in favour of the maker, and from receipt of notice of dishonour in favour of the indorser: *Thorpe* v. *Coombe* (1826), 8 D. & R. 347; *Thorpe* v. *Booth* (1826), Ry. & M. 388; *Holmes* v. *Kerrison* (1810), 2 Taunt. 323; *Moore* v. *Petchell* (1856), 22 Beav. 172. Payment of interest is evidence that a debt is due, and therefore evidence, also, that a demand has been made: *Re Rutherford* (1880), 14 C. D. 687, 689, C. A.; *Way* v. *Bassett* (1845), 5 Hare, 55.

(5) *Conversion and Detention.*

Liability for conversion.

Conversion is "an unauthorized act which deprives another of his property permanently or for an indefinite time": *per* Bramwell, B., in *Hiort* v. *Bott* (1874), L. R. 9 Ex. p. 89. And liability for the conversion arises equally whether the wrong-doer has or has not notice of the title of the true owner, or whether he acts on his own account or simply as agent. Thus a clerk, who innocently forwards to his employer the goods of a stranger (*Stephens* v. *Elwall* (1815), 4 M. & S. 258); a broker, who actively assists in the transfer of goods to his principal (*Hollins* v. *Fowler* (1875), L. R. 7 H. L. 757); and an auctioneer, who sells and delivers goods at the instance of a person who has no title (*Consolidated Co.* v. *Curtis*, [1892] 1 Q. B. 495), are all liable for conversion at the suit of the true owner. No such liability, however, follows upon a mere sale unaccompanied by delivery of possession (*Lancashire Wagon Co.* v. *Fitzhugh* (1861), 6 H. & N. 502); or where the broker or auctioneer simply acts as intermediary between parties who themselves transfer and accept the dominion over the goods: see *per* Bramwell, L.J., in *Cochrane* v. *Rymill* (1879), 27 W. R.

776, C. A. Where wine in wood was deposited with a bailee, the bottling and consumption of part was not a conversion of the whole: *Philpott* v. *Kelly* (1835), 3 A. & E. 106.

Time runs from the conversion.

The action for a conversion is barred in six years from the conversion. Thus, where a person fraudulently pledges the title deeds of another, the statute runs from the pledging: *Miller* v. *Dell*, [1891] 1 Q. B. 468, C. A.; and it makes no difference that the plaintiff did not know of the conversion till after the statutory period, provided the defendant has not practised any fraud to prevent him from obtaining knowledge earlier: *Granger* v. *George* (1826), 5 B. & C. 149. If the goods of A. are by his consent being used by B., there is a conversion upon demand for return of the goods and refusal; or upon any other specific act in derogation of A.'s ownership (*Montague* v. *Sandwich* (1702), 7 Mod. 99), such as a sale by B.; and the statute then runs: *Edwards* v. *Clay* (1860), 28 Beav. 145.

Successive conversions.

When the same chattel is the subject of separate acts of conversion on the part of successive takers, the fact that the statute has run in favour of the first wrongdoer does not bar an action against another person by whom a later act of conversion was committed. Thus where B. fraudulently deposits A.'s deeds with C. to cover an advance, C.'s liability is distinct from that of B., and it has been held that, if he takes innocently, he commits by the taking no conversion, and the statute does not begin to run in his favour until demand for redelivery and refusal: *Spackman* v. *Foster*, 11 Q. B. D. 99; *Miller* v. *Dell*, [1891] 1 Q. B. 468. But this principle is probably confined to title-deeds, as to which, from their close connection with the land, an owner in possession of the land is placed in a specially favourable position. Ordinarily the mere receipt of chattels, with the intention of exercising over them the rights of an owner or pledgee, constitutes a conversion (see *per* Lord Ellenborough in *M'Combie* v. *Davies*, 6 East, 538), and the statute then runs. Its operation is not postponed till there is a sale or other specific dealing with the property: *Denys* v. *Shuckburgh* (1840), 4 Y. & C. Ex. 42.

Wrongful transfer of shares.

Where stock or shares in a company have been wrongfully transferred out of the name of the true owner, no complete cause of action arises against the company until the refusal of the company to recognize the owner. Whatever the state of the register, the shares are all the time under the control of

the company. The statute, therefore, runs from such refusal, and not from the time of the transfer: *Barton* v. *North Staffordshire Ry. Co.* (1888), 38 C. D. 458, p. 463.

Detention.

Where the action is founded upon wrongful detention of chattels, the cause of action arises and the statutory period of six years begins to run, from the time when the detention becomes unlawful. Where title-deeds are held by one who is in possession of the land to which they relate as apparent owner, the custody is *primâ facie* lawful, and there is no wrongful detention and no cause of action, until demand and refusal: *Plant* v. *Cotterill* (1860), 5 H. & N. 430.

Determination of bailment.

Where goods have been entrusted to a bailee or other person whose duty it is to deliver them up on the determination of his lawful custody, and they are converted by him while the custody is lawful, the owner has an election to sue at once for the conversion, or to wait for the proper time for delivery of the goods, and then sue for the wrongful detention. Hence the latter action is not barred by the lapse of more than six years from the conversion: *Wilkinson* v. *Verity* (1871), L. R. 6 C. P. 206; but see *Hinchcliffe* v. *Sharp* (1898), 77 L. T. 714.

(6) *Crown Debts.*

Crown not barred.

The Crown is not bound by the Limitation Act, 1623, and, in accordance with the maxim "*nullum tempus occurrit regi*," the claim of the Crown against its debtor is not liable to be barred by lapse of time: *R.* v. *Morrall* (1818), 6 Pr. 24. Where a debt due from A. to the Crown's debtor, B., is attached by the Crown by legal process, and the statute has then run in favour of A. as against B., so that B. could not recover the debt, the Crown also is barred. "The Crown," said Wood, B., in *R.* v. *Morrall* (*supra*), "is certainly not bound by any statute, so that it might be pleaded in bar by its immediate debtor. But in this case, the claim of the Crown is only a derivative right, and it must therefore stand in the same situation as its principal." But if the statute has not fully run at the time when the debt vests in the Crown, it thereupon ceases to run so long as the debt remains in the Crown: *Lambert* v. *Taylor* (1825), 4 B. & C. 138. If the Crown assigns the debt, so as to vest it again in the hands of a subject, it is not clear how the assignee's right of action will be affected by the statute. This occurred in *Lambert* v. *Taylor*, but, owing to the form of the pleadings, the point

was not discussed. In principle it would seem that the statute would be suspended during the Crown's ownership of the debt, and that the assignee would only be allowed the period unexpired at the date of vesting in the Crown. Time does not run in favour of the Crown, and there is no statutory limitation to a petition of right: *Rustomjee* v. *The Queen* (1876), 1 Q. B. D. 487.

Indemnity under Land Transfer Acts.

In the case of a claim to indemnity owing to an error or omission in the Land Register, or to the making of an entry by or in pursuance of fraud or mistake, the claim is deemed to be a simple contract debt, and, in the event of such a claim arising on the part of the Crown, the Limitation Act, 1623, applies to the Crown in the same manner as to private persons. The cause of action is deemed to arise at the time when the claimant knows, or but for his own default might know, of the existence of his claim: Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 7 (7).

Death duties.

Claims to estate, succession, and legacy duties are subject to a six years' limitation as follows:—

(i.) *Succession Duty upon Property passing under a Document other than a Testamentary Document admitted to Probate.*

An attested copy of the document must be deposited with the Inland Revenue Commissioners and a receipt obtained. If this is done no person is liable for payment of any duty under the document after the expiration of six years from the date of notice to the commissioners of the fact which gave rise to an immediate claim to duty: Customs and Inland Revenue Act, 1889 (52 Vict. c. 7), s. 13.

(ii.) *Succession Duty upon Property passing under Testamentary Documents admitted to Probate or Letters of Administration, and Legacy Duty.*

No person is liable for these duties after the expiration of six years from the date of the settlement of the account in respect of which the duty is payable, where such account was in all respects a true and full account, and contained all the facts material to be known by the commissioners for the ascertainment of the rate and amount of duty; and no trustee, executor, or administrator is, after the expiration of such six

years, liable to such duty, if it is proved to the satisfaction of the commissioners that the account rendered was correct to the best of his knowledge, information, and belief: Customs and Inland Revenue Act, 1889 (52 Vict. c. 7), s. 14.

(iii.) *Estate Duty.*

The provisions of the Act of 1889 just referred to apply to estate duty in the same manner as to succession duty, but an account is not settled within sect. 14 until the time for payment of the duty on such account has arrived: Finance Act, 1894 (57 Vict. c. 30), s. 8 (2).

As to the limitation in favour of purchasers and mortgagees, see *supra*, p. 163.

Heir apparent.

Particulars of any debt or demand against the heir-apparent to the throne, having a separate establishment, must be delivered within ten days after the expiration of the quarter in which the debt or demand was incurred; in default, every such debt or demand is barred both at law and in equity, and every security given in consideration thereof is void; when such particulars have been properly delivered, the creditor may sue as in the Act provided within three calendar months after delivery of the particulars, but not afterwards: 35 Geo. 3, c. 125 (ss. 7, 9).

(7) *Deceased Persons.*

Survival of actions of tort.

Under 4 Edw. 3, c. 7, and the equitable construction placed upon it, a right of action for injuries to personal estate survives to the executors or administrators of the owner: Williams on Executors, 10th ed. pt. ii., bk. iii., ch. 1, s. 1, pp. 606, 607. But, prior to the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), this was not so as regards real estate; nor did an action against a tortfeasor in respect of injuries to real or personal estate survive. That statute gives a remedy for or against the personal representatives in such cases, and also imposes special limitations, as follows:—

Civil Procedure Act, 1833, s. 2.

> "And whereas there is no remedy provided by law for injuries to the real estate of any person deceased, committed in his lifetime, nor for certain wrongs done by a person deceased in his lifetime to another in respect of his property, real or personal; for remedy thereof be it enacted, that an action of trespass or

trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person; and further, that an action of trespass or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person."

Action by executors, etc., for injury to real estate within six months before death, if brought within one year after death.

Action against executors, etc., for injury to real or personal property within six months before death, if brought within six months of assuming administration.

The same provision is made in Ireland by sect. 31 of the Debtors (Ireland) Act, 1840 (3 & 4 Vict. c. 105).

Injury to real estate of deceased.

The section gives an action to the personal representatives of a deceased person for injuries to his real estate in his lifetime for which he might have brought an action; in other words, a right of action for tort to real estate now survives; the injury, however, must have been committed within six calendar months before the death, and the action must be brought within a year after the death. This special limitation takes the place of the six years' limitation, running from the date of the injury, which would otherwise apply.

Injury by deceased.

The section also gives an action against the personal representatives of a deceased person for torts committed by him within six calendar months before his death to another in respect of that other's real or personal property, the action to be brought within six months of the commencement of the administration. Where the same injury gives rise to a form of action which survives, and also to an action under the statute, the recovery of damages for six months before the death in an action under the statute does not preclude the recovery of damages for the prior period in the other action. Thus where the injury is the tortious taking and selling of coal from the

land of the deceased, the recovery of damages for six months under the statute leaves the personal representative at liberty to recover the proceeds of sale for the prior period in an action for money had and received: *Powell* v. *Rees* (1837), 7 A. & E. 426. Where a tenant for life, who is liable to repair, leaves the premises out of repair at his death, the remainderman can bring an action against his executor under the statute: *Woodhouse* v. *Walker* (1880), 5 Q. B. D. 404.

Action commenced in life of wrongdoer.

Although an action has been commenced against the wrongdoer during his life, yet the limitation of the statute is strictly applied; and if at the time of his death more than six months have elapsed from the commission of the injury, the action as against his executors is barred: *Kirk* v. *Todd* (1882), 21 C. D. 484, C. A.

Continuing injury.

Where the act complained of forms a continuing injury, as in the case of an obstruction of light, and an action has been begun by the person injured in his lifetime, the executor can obtain an order to carry on the proceedings, and can recover damages for the six months before the original plaintiff's death: *Jones* v. *Simes* (1890), 43 C. D. 607. Similarly, where it is the wrongdoer who has died, an action will lie against his administrator within six months of the grant of administration, although the building which causes the obstruction was erected more than six months before the death. Since the injury is a continuing one, it is committed within the six months as well as before: *Jenks* v. *Viscount Clifden*, [1897] 1 Ch. 694.

Fatal accidents.

In the event of the death of any person in consequence of the wrongful act, neglect, or default of another, an action for the benefit of certain relatives of the deceased may be brought by his executor or administrator against the person responsible; but any such action must be commenced within twelve calendar months of the death: Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), ss. 1-3.

(8) *Executors.*

Devastavit.

A *devastavit* by an executor—that is, an improper application of assets whereby a creditor of the testator is prevented from recovering his debt—is a tort to the creditor in respect of his personal estate, and, in an action against the executor personally, the limitation upon "case" applies, and the action is barred in

six years: *Thorne* v. *Kerr* (1855), 2 K. & J. 54; *Re Gale* (1883), 22 C. D. 820; *Lacons* v. *Wormall* [1907], 2 K. B. 350, C. A.

Administration action.

But where the executor is a defendant to proceedings in his representative capacity a different rule applies. The assets of the testator which he has not accounted for are deemed to be still in his hands, and the Limitation Act, 1623, does not in such proceedings protect him against a devastavit which is more than six years old. In other words, he cannot set up his own *devastavit* and then claim the benefit of the statute in respect of it: *Re Marsden* (1884), 26 C. D. 783; *Re Hyatt* (1888), 38 C. D. 609; though, provided the devastavit has not consisted in misappropriation by the executor, he could now avail himself of the Trustee Act, 1888, s. 8 (*infra*, p. 280).

(9) *Extraordinary Traffic Expenses.*

It was provided by sect. 23 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), that extraordinary traffic expenses, certified by the surveyor to a highway authority, might be recovered in a summary manner from the person by whose order the traffic had been conducted; and by sect. 36 the Summary Jurisdiction Acts were made applicable. The six months ran from the date of the certificate, and when this period had elapsed, expenses included in that certificate (if it was valid) could not be recovered under a subsequent certificate: *Wirral Highway Board* v. *Newell*, [1895] 1 Q. B. 827; *cf. White* v. *Colson* (1881), 46 J. P. 565; *Pool & Forden Highway Board* v. *Gunning* (1882), 51 L. J. M. C. 49.

The above section was amended by sect. 12 of the Locomotives Act, 1898 (61 & 62 Vict. c. 29), which provided:—(*a*) that extraordinary traffic expenses should cease to be recoverable in a summary manner, but should be recovered, if not exceeding £250, in the county court, and, if exceeding that sum, in the High Court; (*b*) that proceedings for their recovery should be commenced within twelve months of the time at which the damage had been done, or, where the damage was the consequence of any particular building contract, or work extending over a long period, not later than six months after the completion of the contract or work; and (*c*) that for the words "by whose order" there should be substituted "by or in consequence of whose order." This last amendment rendered the highway

authority liable in respect of work done by contractors: *Epsom District Council* v. *London County Council*, [1900] 2 Q. B. 751.

Period of limitation.

The effect of sub-clause (*b*) is not to introduce two independent limitations; one of twelve months for ordinary cases, and one of six months for work extending over a long period. In all cases the highway authority who are complaining may bring the action within twelve months after the damage has been done, and recover for damage done within that period. And further, and in addition to this, they may recover for damage which has not been caused within the twelve months, provided the damage is "the consequence of any particular building contract or work extending over a long period," and in that case the action must be commenced not later than six months after the completion of the contract or work: *Kent County Council* v. *Folkestone Corporation*, [1905] 1 K. B. 620, C. A.; *per* Stirling, L.J., at p. 636. The fact that the twelve months' limitation applies to all cases was overlooked in *Epsom District Council* v. *London County Council* (*supra*), where no damages were allowed in respect of a particular building contract which had been completed more than six months before action, although damage had been suffered within the twelve months.

The expression "work extending over a long period" refers to the particular operation causing the damage; it does not include the entire operations undertaken by the defendants where these involve a series of independent works: *Kent County Council* v. *Folkestone Corporation* (*supra*). The expression does not cover contracts for the haulage of stone required by a local authority for its general purposes: *Bromley District Council* v. *Croydon Corporation*, [1908] 1 K. B. 353, C. A.; nor is the period extended by a provision that the work shall remain at the risk of the contractors for a year after completion: *Lancaster District Council* v. *Fisher*, [1907] 2 K. B. 516, C. A.

(10) *Foreign Judgment.*

Ranks as simple contract.

An action brought in this country to enforce a foreign judgment ranks as an action on simple contract, and it is barred in six years from the judgment: see *Dupleix* v. *De Roven* (1705), 2 Vern. 540. The liability of the defendant arises upon an implied contract to pay the amount of the foreign judgment: *Grant* v. *Easton* (1883), 13 Q. B. D. p. 303, C. A.

(11) *Goods Sold.*

Sale for cash; on credit.

If goods are sold to be paid for on demand, the statute begins to run immediately upon the making of the contract: *Jackson* v. *Ogg* (1859), Johns. 397, *per* Wood, V.C.; if they are sold on stated credit, the statute runs from the end of the stated period: *Helps* v. *Winterbottom* (1831), 2 B. & Ad. 431.

(12) *Guarantee.*

Surety.

An action lies on a guarantee or a contract of suretyship as soon as the principal debt is due and is not paid, and the statute thereupon runs in favour of the guarantor or surety. The fact that the creditor allows a loan to remain at interest after the due date for repayment does not prevent the statute from running in favour of the surety; if any agreement not to sue can be implied, it is only an agreement not to sue for a reasonable time: *Henton* v. *Paddison* (1893), 68 L. T. 405. Probably, however, no such implication, so as to postpone the statute, would be made. But by express stipulation the accrual of the surety's liability may be postponed to a later date than the due date of the debt, as where it is a term of the guarantee that a specified time—such as three months—shall be allowed for proceedings against the principal debtor before the guarantor is called upon to pay, and then the statute runs from the end of this period: *Holl* v. *Hadley* (1835), 2 A. & E. 758.

Accrual of action.

Where there is no fixed date for payment of the debt, the due date for the purpose of the statute will be determined by the circumstances. Thus if the debt is a matter of account between the creditor and the principal debtor, the action on the guarantee arises as soon as all the facts on which the adjustment of the accounts depends are ascertained, notwithstanding that the actual adjustment may be delayed by litigation: *Colvin* v. *Buckle* (1841), 8 M. & W. 680. A joint and several promissory note by A. and B., payable on demand, with an accompanying memorandum that it is to cover A.'s banking account, is a security for the fluctuating balance, and the statute does not run in favour of B. while the account is open: *Hartland* v. *Jukes* (1863), 1 H. & C. 667. If the guarantee is to cover advances by the bank, the claim of the bank will be barred after six years from the date of the last advance, but the guarantor may still

be liable for interest and banking charges accrued since: *Parr's Banking Co.* v. *Yates*, [1898] 2 Q. B. 460, C. A.

The right of the creditor against the surety is not dependent upon his right against the principal debtor; hence the fact that the statute has run in favour of the latter does not operate as a release to the surety so as to entitle him to the return of property of his held by the creditor as security: *Carter* v. *White* (1883), 25 C. D. 666, p. 672, C. A.

(13) *Guardians (Poor Law).*

Debts due from Poor Law Guardians.

22 & 23 Vict. c. 49, s. 1.

Three months from end of half-year in which debt incurred.

The Poor Law (Payment of Debts) Act, 1869 (22 & 23 Vict. c. 49), provides to the following effect: (*b*)

Any debt, claim, or demand lawfully incurred by or become due from guardians shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards; the commencement of such half-year to be reckoned from the time when the last half-year's account shall or ought to have been closed according to the order of the Poor Law Board; provided that the Poor Law Board may extend the time within which payment shall be made for a period not exceeding twelve months after the date of such debt, claim, or demand.

Sect. 3. Time runs against loans on rates from due date or from twelve months after advance.

In the case of loans to guardians charged on the poor rates, and made payable on a day certain, the above time of limitation runs from that day; and if not made payable on a day certain, then at the end of twelve months from the advance; in the case of debts payable by instalments, each instalment is payable within one year of its due date; with power for the Board in any of these cases to allow an extension of six months.

Sect. 4. Judgment to be satisfied if due diligence used.

If any person claiming any debt or demand shall have commenced proceedings in any court of law or equity, or before any justice or other competent authority, within the time hereinbefore limited, or within the time to which the Poor Law Board may grant extension, and shall with due diligence prosecute such proceedings to judgment, such judgment shall be satisfied by the guardians, notwithstanding that it is recovered after the expiration of the period.

Sect. 5. Solicitors' bills.

Solicitors' bills are not to be paid till the final determination of the suit or cessation of the retainer; but the bill of costs is to be taxed and paid within one year after such determination or cesser, unless the Poor Law Board extend the time for a period not exceeding six months; if the solicitor takes

(*b*) These sections are not quoted in full.

proceedings within such time, he has the same rights as under sect. 4.

As to what is a prosecuting with due diligence within sect. 4, see *Rhodes* v. *Pateley Bridge Union* (1884), 51 L. T. 235.

Effect of the limitation.

Since under sect. 1 the debt cannot be paid after the time limited, it cannot be sued for after that time: *Baker* v. *Guardians of Billericay Union* (1863), 2 H. & C. 642. The words "claim and demand" are not limited to claims arising under contract; they cover everything, and the limitation applies, therefore, to weekly sums ordered by justices to be paid by guardians for the maintenance of a lunatic: *Reg.* v. *Guardians of Stepney Union* (1874), L. R. 9 Q. B. 383. But the Act does not extend to the debts of guardians in their character of a rural sanitary authority: *Dearle* v. *Petersfield Union* (1888), 21 Q. B. D. 447, C. A. The effect is to impose a limitation of three months from the end of the half-year in which the debt accrues: S. C.; but no debt accrues due until the amount is ascertained: *Sharpington* v. *Fulham Guardians*, [1904] 2 Ch. 449.

Costs.

As to costs payable by guardians to adverse litigants no debt accrues due until taxation: *Midland Ry. Co.* v. *Edmonton Union*, [1895] A. C. 485; and time runs from the date of the certificate, not from the order for payment of costs: *West Ham Union* v. *Churchwardens of St. Matthew, Bethnal Green*, [1896] A. C. 477. This applies to costs generally, not only to House of Lords costs: *Manchester, Sheffield and Lincolnshire Railway Co.* v. *Doncaster Union*, [1897] 1 Q. B. 117, C. A. The application to tax is not a commencement of proceedings within sect. 4. The proceedings there referred to, which are to be commenced within the time limited, must be such as will result in a judgment or in a final settlement equivalent to a judgment: *West Ham Union* v. *Churchwardens of St. Matthew, Bethnal Green* (*supra*), *per* Lord Herschell, L.C., at p. 490.

(14) *Indemnity.*

Statute runs from loss.

Under a contract of indemnity the cause of action arises when the damage which the indemnity is to cover is suffered: *Reynolds* v. *Doyle* (1840), 1 Man. & Gr. 753; *Tunstall* v. *Bartlett* (1866), 14 L. T. 400. Thus under an express contract to indemnify a party to litigation against costs, the cause of action arises upon the actual payment of costs by such

party; not when the costs were incurred, or the solicitor's bill delivered; and the statute runs from such payment: *Collinge* v. *Heywood* (1839), 9 A. & E. 633; and similarly under an implied promise to indemnify, the statute runs from actual loss: *Huntley* v. *Sanderson* (1833), 1 Cr. & M. 467.

As to claims for indemnity under the Land Transfer Act, 1897, *vide supra*, p. 225.

Surety's right of indemnity.

An implied right of indemnity exists in favour of a surety as against the principal debtor. At common law this is enforced by means of an action for money paid to the use of the principal debtor, and the cause of action does not arise until the surety has paid the principal debt or some part of it. Thereupon the statute runs as to each such payment from the time when it is made: *Davies* v. *Humphreys* (1840), 6 M. & W. 153. It follows that the right of indemnity is not barred because the creditor's action against the principal debtor is barred. Thus if the creditor recovers judgment against the surety after the lapse of six years from the due date of the principal debt, the surety can recover from the principal debtor sums paid within six years before the surety's action: *Considine* v. *Considine* (1846), 9 Ir. L. R. 400. Similarly the accommodation acceptor of a bill of exchange has an implied engagement from the drawer that he will take up the bill at maturity and indemnify the acceptor; and there is no cause of action at common law till the acceptor is damnified by actual payment: *Reynolds* v. *Doyle* (1840), 1 M. & Gr. 753; *Angrove* v. *Tippett* (1865), 11 L. T. 708.

Interest.

A sum recoverable by way of indemnity carries interest, but where such sum is charged on land the interest recoverable is limited to six years' arrears: *Scottish Provident Institution* v. *Conolly* (1893), 31 L. R. Ir. 329. A surety for an annuity who has paid gales of the annuity becomes a creditor for the amounts so paid and interest as though they were sums in gross. His right, consequently, is to recover such sums and not arrears of the annuity as such: S. C.

Contribution.

The right of contribution as between co-sureties or co-debtors, though not founded on contract, but on general principles of justice (*Dering* v. *Earl of Winchelsea* (1787), 1 Cox, p. 321), is analogous to the right of indemnity and is subject to similar rules. It can be asserted against the co-surety notwithstanding that the creditor's right of action against

him is barred: *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514; and no action will lie at common law in favour of a surety against his co-surety, or in favour of one co-debtor against the rest, until he has paid more than his share of the debt. "Whenever," said Parke, B., in *Davies* v. *Humphreys* (1840), 6 M. & W. p. 169, "it happens that one has paid more than his proportion of what the sureties can ever be called upon to pay, then and not till then it is also clear that such part ought to be repaid by the others, and the action will lie for it." Consequently until the surety has paid more than his share of the entire debt, there is no debt due to him from his co-surety upon which he can found bankruptcy proceedings against the co-surety: *Ex parte Snowdon* (1881), 17 C. D. 44, C. A.

Indemnity and contribution in equity.

But both as regards indemnity and contribution the rule in equity is different. It may be a matter of the greatest moment that the surety who is entitled to be indemnified by the principal debtor, or the co-surety or co-debtor who is entitled to contribution, should be able to avail himself of this right before he has actually paid the amount for which he is himself liable. He is, accordingly, allowed to assert this right so soon as demand for payment has been made upon him, and the extent of his liability to the creditor, if doubtful, judicially ascertained: see *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514. And it may be that since the Judicature Acts the accrual of this equitable right of indemnity gives the starting-point for the statute: *Wolmershausen* v. *Gullick* (*loc. cit.* p. 529); *Robinson* v. *Harkin*, [1896] 2 Ch. 415. But this prospective right to indemnity is substantially different from the right which accrues upon actual payment by the surety. It is probably correct to say that upon such payment a fresh cause of action accrues to the surety against which the statute then begins to run, and, as between co-debtors, it has been so held in Ireland: *Gardner* v. *Brooke*, [1897] 2 I. R. p. 20.

Six years' limitation.

The right to indemnity or contribution ranks as simple contract: see *Copis* v. *Middleton* (1823), T. & R. 224; *Sanderson* v. *Benson* (1841), 4 Beav. 350 (liability of equitable assignee of leaseholds to indemnify lessee), and the limitation is six years. But under s. 5 of the Mere. L. A. A., 1856, the surety or co-debtor is entitled to an assignment of the creditor's specialty and other securities, and hence would have the benefit of the unexpired period of 20 or 12 years.

(15) *Libel and Slander.*

Libel.

An action for libel is barred in six years from the date of publication, but each publication gives a fresh cause of action. Hence, where the libel is in a newspaper, there is a fresh publication on each sale of the paper, and an action lies within six years of any sale, notwithstanding that more than six years have elapsed since the first publication: *Duke of Brunswick* v. *Harmer* (1849), 14 Q. B. 185.

Slander.

Actions on the case (other than for slander) are to be brought within six years next after the cause of action; actions upon the case for words within two years after the words spoken. The limitation of two years applies, however, only where the words spoken are themselves actionable. If the words are such that, to support the action, evidence must be given of special damage, then the special damage furnishes the cause of action, and the limitation of two years does not apply. The action can accordingly be brought within six years from the special damage: *Law* v. *Harwood* (1628), 1 Cro. Car. 140; *Saunders* v. *Edwards* (1663), 1 Sid. 95; *Browne* v. *Gibbons* (1702), 1 Salk. 206. In *Littleboy* v. *Wright* (1663), 1 Lev. 69, it was considered that only two years was allowed from the special damage, but it is obvious that this limitation only applies where the time is reckoned from the words spoken. There is an error as to this in *Backhouse* v. *Bonomi* (1861) 9 H. L. C. p. 513.

(16) *Lunatics.*

Arrears of maintenance

Under sect. 299 (1) of the Lunacy Act, 1890 (53 & 54 Vict. c. 5), the personal property of a lunatic chargeable to a union, and the rents of his real estate, are made liable for the expenses of his maintenance; and under sub-sect. 2 trustees of a lunatic's property are authorized to apply the property in repaying these expenses. Whether these enactments are based on a recognition of a pre-existing liability, or create a new statutory liability, the liability is on the footing of simple contract, and only six years' arrears of maintenance are recoverable: *Re Harris* (1880), 49 L. J. Ch. 327, C. A.; *Re Newbegin* (1887), 36 C. D. 477, on the Lunatic Asylums Act, 1853, s. 104; *Re Watson*, [1899] 1 Ch. 72; *cf. Wandsworth Union* v. *Worthington*, [1906] 1 K. B. 420. And six years' arrears are recoverable by action, notwithstanding the provision of sect. 16 of the Poor Law Act,

1849 (12 & 13 Vict. c. 103), for the summary recovery by the guardians of one year's maintenance: *Re Clabbon*, [1904] 2 Ch. 465; *Birkenhead Union* v. *Brookes* (1906), 95 L. T. 359. As to allowance of six years' maintenance to a relative of the lunatic, see *Re Weaver* (1882), 21 C. D. 615.

Necessaries.

And generally, an action of debt can be brought to recover the cost of necessaries supplied for a lunatic: *Brockwell* v. *Bullock* (1889), 22 Q. B. D. 567, C. A.; and the statute runs at once; though if the claim is such that the creditor would be restrained from prosecuting it during the lunatic's life, the six years is reckoned from his death. This is so with regard to the costs of solicitors employed in prosecuting the commission in lunacy and employed subsequently by the committee: *Stedman* v. *Hart* (1854), Kay, 607. A petition in lunacy, after the death of the lunatic, by the committee, and a report of the master that money is due to him, does not stop the statute running in favour of the heir-at-law if he is not a party to the proceedings: *Wilkinson* v. *Wilkinson* (1851), 9 Hare, 204.

Debts incurred before lunacy.

Debts, other than for necessaries, can only have been incurred before the lunacy, and if the statute has commenced to run, the lunacy of the defendant does not in general stop it: *Congreve* v. *Power* (1828), 1 Moll. 121. On the Irish Lunacy Act, 1871 (34 Vict. c. 22), s. 95, it has been held that the Court will not pay statute-barred debts of a lunatic contracted before the lunacy: *Re Kenrick*, [1907] 1 I. R. 480. Where a claim has been actually made in proceedings in the lunacy, and has failed, the creditor will not, if the statute has run, be allowed to assert the claim against the lunatic's estate after his death: *Rock* v. *Cooke* (1847), 1 De G. & Sm. 675.

(17) *Money lent.*

No time fixed for repayment.

Where no time is fixed for re-payment of a loan, the statute runs from the date of the advance. When the advance is made by cheque, it is deemed to be made when the cheque is presented at the lender's bank and cashed, not when it is paid in to the borrower's bank, although at once credited to him: *Garden* v. *Bruce* (1868), L. R. 3 C. P. 300. And when money lent is repayable on demand, no demand is necessary, and the statute runs forthwith: *Jackson* v. *Ogg* (1859), Johns. 397.

Time fixed.

If a time is fixed for payment, the statute runs as soon as an action can be brought. Thus, where the loan was for five

years, subject to the right of the lender to call it in on twenty-one days' default in payment of interest, the statute ran so soon as default had been made for twenty-one days: *Hemp* v. *Garland* (1843), 4 Q. B. 519; *Reeves* v. *Butcher*, [1891] 2 Q. B. 509, C. A. And if the loan is secured by a bill, the statute runs from the due date of the bill, not from the advance: *Wittersheim* v. *Countess of Carlisle* (1791), 1 H. Bl. 631.

Repayment subject to condition.

Where money lent is not repayable till a condition is performed, as the production of a passbook, the statute does not run till such production: *Atkinson* v. *Bradford Building Society* (1890), 25 Q. B. D. 377. But where an advance is made upon security, with provision, in case of default in payment, for realization of the security, the borrower undertaking to pay any deficiency, the statute runs from the default in payment at the due date, and a new cause of action on the undertaking does not arise when the deficiency is ascertained: *Re McHenry*, [1894] 3 Ch. 290, C. A.

Mortgage not under seal.

Where an advance is secured by a deposit of title-deeds accompanied by a memorandum not under seal, the advance creates a simple contract debt which is liable to be barred in six years. The fact that the money is charged on land does not make the limitation of twelve years under sect. 8 of the R. P. L. A., 1874, apply to the personal remedy: *Barnes* v. *Glenton* (1899), 1 Q. B. 885, C. A. Nor is the time extended by the fact that the mortgagor has agreed to execute a legal mortgage which would contain a covenant for payment: *Firth* v. *Slingsby* (1888), 58 L. T. 481; *cf. Brocklehurst* v. *Jessop* (1835), 7 Sim. 438. But the circumstance that the debt is barred does not prevent the mortgagee from enforcing his security against the property comprised therein: *London and Midland Bank* v. *Mitchell*, [1899] 2 Ch. 161.

(18) *Money paid.*

Payment by sub-tenant to lessor.

In an action to recover money paid for the defendant, where the plaintiff was not under direct liability to pay, the statute runs from the time when the defendant adopted or got the benefit of the payment. Thus money paid on account of rent by a sub-tenant to a lessor is money paid for the lessee as soon as he claims credit for it from the lessor: *Ahearne* v. *M'Swiney* (1874), Ir. R. 8 C. L. 568. Where the plaintiff was bound to

pay, as in the case of co-debtors, the statue runs from the actual payment: *Gardner* v. *Brooke*, [1897] 2 I. R. 6, C. A. (*supra*, p. 235).

(19) *Money received.*

Mistake and failure of consideration.

An action for money had and received has been considered to be in a sense an equitable action and to lie for money which "*ex æquo et bono* the defendant ought to refund": *per* Lord Mansfield, in *Moses* v. *Macferlan* (1760), 2 Burr. p. 1012. It lies, for instance, for money which has been paid under a mistake of fact, or upon a consideration which has failed. It has been said that the action will not lie until the fact of the mistake or failure of consideration has been communicated to the defendant, and a demand for return of the money made: see *per* Martin and Bramwell, BB., in *Freeman* v. *Jefferies* (1869), L. R. 4 Ex. 189. But it may be doubted whether this is so for the purpose of the Statute of Limitations, as the plaintiff would thus be able to postpone at his pleasure the operation of the statute in favour of the defendant. The true principle seems to be that the cause of action accrues and the statute runs, in the case of mistake, as soon as the mistake is, or with reasonable diligence could have been, discovered; and, in the case of failure of consideration, so soon as the failure has with certainty occurred. Thus, where the security for an annuity was set aside, an action lay within six years from this event, though more than six years had elapsed since the annuity was last paid: *Huggins* v. *Coates* (1843), 5 Q. B. 432. Where the annuity was void on account of a defect in the memorial, the action accrued on the grantor's election to avail himself of the defect: *Cowper* v. *Godmond* (1833), 9 Bing. 748.

(20) *Partnership Accounts.*

Statute no bar while partnership lasts.

So long as the partnership relation exists the statute is no bar to an account, and the account will be carried back through the whole partnership or to the last settlement; notwithstanding that the partnership business has been discontinued for more than six years: *Miller* v. *Miller* (1869), 8 Eq. 499. Upon a dissolution of the partnership, however, a partner who continues the business is not a trustee for the retiring partner or for the representatives of a deceased partner, and the right to an account is barred at the end of six years from the termination

of the partnership: *Knox* v. *Gye* (1872), L. R. 5 H. L. p. 676 *Barton* v. *North Staffordshire Ry. Co.* (1888), 38 C. D. p. 463; *Noyes* v. *Crawley* (1878), 10 C. D. 31; *The Pongola* (1895), 73 L. T. 512. Provided, however, that the action is commenced within six years, the account will be carried back till the last settlement or the commencement of the partnership; and it will not be interrupted by the fact that the partnership has been reconstituted, if the keeping of the accounts of the business has been practically continuous: *Betjemann* v. *Betjemann*, [1895] 2 Ch. 474, C. A. As to dissolution by death, see *Millington* v. *Holland* (1869), 18 W. R. 184.

(21) *Penalties.*

31 Eliz. c. 5, s. 5. Penalty to Crown only: two years.

Penalty to Crown and informer: one year for informer: two years further for Crown.

By 31 Eliz. c. 5, s. 5, it was provided that all actions, indictments, or informations for any forfeiture upon a penal statute made or to be made whereby the forfeiture was limited to the Crown only, should be brought or exhibited within two years after the offence committed; and all actions or informations for any forfeiture upon a penal statute, the benefit whereof was limited to the Crown and the prosecutor, should be brought by any person that might lawfully pursue the same within one year next after the offence committed; with a further limitation for the Crown, in default of private prosecution, of two years after such year ended; with a proviso saving any shorter statutory limitations. The Act was repealed as regards informations by the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 36.

Present operation of statute.

Thus the effect is that summary proceedings on penal statutes are subject to the six months' limitation of the Summary Jurisdiction Act unless a shorter period is expressly limited; other proceedings are subject, if the penalty goes to the Crown only, to a two years' limitation, reckoned from before the filing of the information: see Crown Suits Act, 1865 (28 & 29 Vict. c. 104), ss. 8, 10; *cf. Att.-Gen.* v. *Hall* (1823), 11 Price, 760; and if the penalty goes to the Crown and an informer, to a one year's limitation as regards the informer, and to a further two years' limitation as regards the Crown.

The statute of Elizabeth has been held to extend also to the case of an action brought by an informer upon a statute whereby no part of the penalty is limited to the Crown: *Lookup* v. *Frederick* (1767), 4 Burr. 2018; *Dyer* v. *Best* (1866),

L. R. 1 Ex. 152; see *Barrett* v. *Johnson* (1836), 2 Jon. Ex. R. Ir. 197; but this has been doubted: *Robinson* v. *Currey* (1881), 7 Q. B. D. 465, C. A. A year's limitation is, however, in effect imposed in such a case by 21 Jac. 1, c. 4, s. 3, which requires a common informer to make an affidavit that the offence was committed within a year before the information or suit.

Action by party grieved.

Actions for a statutory penalty brought by the party grieved are not within the statute of Elizabeth (Noy, 71) unless the party grieved is suing as informer: *Lewis* v. *Davis* (1875), L. R. 10 Ex. 86; but under the Civil Procedure Act, 1833, s. 3 (*supra*, p. 194)—in Ireland the Ir. C. L. P. A., 1853, s. 20—they are subject to a limitation of two years from the cause of action, unless a different limitation is imposed by the particular statute. The Acts just referred to extend to "actions for penalties, damages, or sums of money given to the party grieved by any statute," but the "damages or sums of money" must be exacted by way of penalty. In other words the two years' limitation under the Acts applies only to penal actions brought by the party grieved: *Thomson* v. *Clanmorris*, [1900] 1 Ch. 718, C. A.

Penalty or damages.

Whether a sum recoverable under a statute is given as a penalty or damages will depend on the words and object of the particular statute. Sums which are exacted from the defendant as a punishment, and are assessed by reference to his conduct, and not by reference to the damage sustained by the plaintiff, are penalties; and this is ordinarily the case with sums recoverable on breach of the provisions of a statute: *Saunders* v. *Wiel*, [1892] 2 Q. B. 321, C. A., decided on the Patents, etc., Act, 1883. But sums recoverable under the Dramatic Copyright Act, 1833 (3 & 4 Will. 4, c. 15), and Copyright (Musical Compositions) Act, 1888 (51 & 52 Vict. c. 17), are recoverable by way of damages: see *Adams* v. *Batley* (1887), 18 Q. B. D. 625, C. A.; and so is compensation obtained from a director under the Directors' Liability Act, 1890 (53 & 54 Vict. c. 64), s. 3, in respect of untrue statements in a prospectus: *Thomson* v. *Clanmorris*, [1900] 1 Ch. 718. The limitation in such cases is six years from the accrual of the cause of action. A remedy in damages is also given by the Companies Act, 1900 (63 & 64 Vict. c. 48), s. 5, against a director who knowingly contravenes, or permits or authorizes the contravention of, the provisions of

the Act as to allotment of shares, but the proceedings must be commenced not less than two years after the allotment.

Corporations authorized to sue for penalties.

A corporation, such as the Goldsmiths' Company, which is by statute authorized to sue for penalties, is neither a party grieved, so as to be subject to the Civil Procedure Act, 1833, nor an informer, so as to be within 31 Eliz. c. 5; and the corporation can bring an action more than two years after the cause of action accrued: *Robinson* v. *Currey* (*supra*).

Penalties under bye-laws

The limitation on penalties in the Civil Procedure Act, 1833, is confined to penalties given by statute. Where a corporation is established by charter, a penalty due from a member under a byelaw is on the footing of a simple contract debt, and is barred in six years: *Tobacco Pipe Makers Co.* v. *Loder* (1851), 16 Q. B. 765; but if the liability of the member is based on statute or on a deed of settlement, the limitation is twenty years: *supra*, p. 195.

Advertisements for stolen property.

By sect. 102 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), it is provided that advertisements offering a reward for the return of stolen or lost property, in which it is intimated that no questions will be asked, and other specified advertisements of a similar nature, shall render the advertiser liable to forfeit £50 to any persons who will sue for the same. But by sect. 3 of the Larceny (Advertisements) Act, 1870 (33 & 34 Vict. c. 65), every action against the printer or publisher of a newspaper to recover such a forfeiture must be brought within six months after the forfeiture is incurred.

(22) *Personal Property.*

No general limitation.

There is no statute which limits generally actions for the recovery of personal property in a manner similar to the limitation imposed by the R. P. L. Acts on the recovery of real property. When a specific injury has been done in regard to personal property, so as to give rise to a cause of action such as detinue or trover, the case is within the Limitation Act, 1623. But the mere right to recover personal property is not subject to any statutory bar, and the Courts will not apply such a bar in analogy to the R. P. L. Acts: *Mellersh* v. *Brown* (1890), 45 C. D. 225; *Charter* v. *Watson*, [1899] 1 Ch. p. 180. In the case of a mortgage of a reversionary interest the right to recover the property does not arise till it falls into possession, and the

mortgagee is then entitled to it, although his personal remedy for the mortgage debt may be barred: *Re Hancock* (1888), 59 L. T. 197; *Re Lake's Trusts* (1890), 63 L. T. 416; *Re Lowes' Settlement* (1861), 30 Beav. 95.

There is no bar, it has been held, to the right to redeem personal chattels in pledge, at any rate during the life of the pledgor: *Kemp* v. *Westbrook* (1749), 1 Ves. S. 278.

Property taken by police.

Under the Police (Property) Act, 1897 (60 & 61 Vict. c. 30), s. 1, a court of summary jurisdiction may make an order for the delivery of property in the possession of the police in connection with a criminal charge, or under certain statutes, to the person appearing to be the owner; and the right of any person to take proceedings against a person in possession by virtue of the order is limited to six months from the date of the order.

(23) *Principal and Agent.*

Statute no bar while agency lasts.

The same rule applies to agency as to partnership (*supra*, p. 239), the latter relation, indeed, being only a particular case of the former. As long as the agency lasts, the statute is no bar to an account: see *The Pongola* (1895), 73 L. T. 512, where it was held that there was a continuing relation of agency or partnership between the co-owners of a ship and the managing owners, so as to prevent the statute running. But when the relation of principal and agent has come to an end, the statute will run: *Friend* v. *Young*, [1897] 2 Ch. 421; and unless the agent has been placed in the position of an express trustee by being entrusted with funds to manage on behalf of his principal, as in *Burdick* v. *Garrick* (1870), 5 Ch. 233, the right to an account is barred at the end of six years from the last transaction under the agency. As against a fraudulent agent, time is no bar: *Walsham* v. *Stainton* (1863), 12 W. R. 63, C. A. And see *North American Land, etc., Co.* v. *Watkins*, [1904] 1 Ch. 242.

Factor.

Upon a contract by a factor to account, and to pay over the balance due on demand, no action will lie for not accounting till after demand; hence the statute only runs from demand; though after a reasonable time a demand would be presumed, and fourteen years would be sufficient to raise the presumption in the absence of rebutting circumstances: *Topham* v. *Braddick* (1809), 1 Taunt. 572.

(24) *Promise to pay.*

On demand. Where a promise to pay on demand is made by a principal debtor, the statute runs at once, and no demand is necessary: *Collins* v. *Benning* (1700), 12 Mod. 444; Bull N. P. p. 151; *cf.* *Norton* v. *Ellam* (1837), 2 M. & W. 461 (*supra*, p. 221). But if the promise is by way of collateral security, demand is necessary to give a cause of action: *Re J. Brown's Estate*, [1893] 2 Ch. 300. Where demand is necessary before money is due, and it appears that interest has been paid, this imports that a demand has been made, since interest is paid for forbearance of a debt: *Re Rutherford* (1880), 14 C. D. 687, C. A. Upon a promise by a debtor to pay as soon as he is able, the statute runs from the date when he has means to pay the debt: *Hammond* v. *Smith* (1864), 33 Beav. 452; though the creditor may not be aware of the fact: *Waters* v. *Earl of Thanet* (1842), 2 Q. B. 757.

When able.

By instalments. A covenant to pay by promissory notes at successive dates is broken by non-payment of any note, and a cause of action arises on the covenant as well as on the note: *Dixon* v. *Holroyd* (1857), 7 E. & B. 903. And where a promissory note is given for the balance due on an account stated, and it is agreed that it shall be paid by instalments, there is a breach on the first default in payment, and the statute then runs: *Irving* v. *Veitch* (1837), 3 M. & W. 90.

(25) *Rent.*

Use and occupation. Rent due under an indenture of demise is recoverable within six years by distress, but within twenty years in a personal action: *supra*, p. 186. Rent due under tenancies not created by deed is recoverable in an action on the special contract or for use and occupation. In either case the six years' limitation applies, and rent is only recoverable within six years of its becoming due. A tenancy from year to year is properly only determinable by notice to quit, and the liability to pay rent continues until it has been so determined, or until, from the lapse of time, such determination can be presumed. Sixteen years without demand of rent has been held to be sufficient for this purpose: *Stagg* v. *Wyatt* (1838), 2 Jur. 892. In *Leigh* v. *Thornton* (1818), 1 B. & A. 625, evidence of the determination of the tenancy was not required, and it was held that rent was not recoverable where there had been no occupation for six

years, and no act had been done in the meantime from which a tenancy could be inferred. This involves the result that a tenant can determine his tenancy by simply quitting possession, which of course is not correct, and the case cannot be treated as an authority. But if the landlord goes into possession, this will in effect prevent his claiming rent. Moreover, in twelve years the tenant's title would be extinguished, and with it any continuing theoretical liability to rent.

(26) *Seamen.*

Wages.

A six year's limitation was imposed in respect of seamen's wages by the following enactment:—

> "All suits and actions in the Court of Admiralty for seamen's wages, which shall become due after the said first day of Trinity Term [*i.e.* in 1706], shall be commenced and sued within six years next after the cause of such suits or actions and not after." 4 & 5 Anne, c. 3, s. 17.

The corresponding Irish enactment—6 Anne, c. 10 (Ir.)—was rendered unnecessary by the C. L. P. A. (Ir.) 1853, (16 & 17 Vict. c. 113), s. 20, and was accordingly repealed by that statute.

Debt of deceased seaman.

By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 178, a creditor against the estate of a deceased seaman is not entitled by any means to obtain payment of his debt out of the property of the seaman in the hands of the Board of Trade if the debt accrued more than three years before the death, or if the demand is not made within two years after the death.

(27) *Set-off.*

The right to plead a set-off arises under the Statutes of Set-off (2 Geo. 2, c. 22; 8 Geo. 2, c. 24, ss. 4, 5), and exists side by side with the right of counterclaim under the Judicature Acts (Judic. Act, 1873, s. 24 (3); R. S. C. 1883, Ord. 19, r. 3). A set-off must be a cross-claim for a liquidated amount, and it can be pleaded only to a liquidated claim. It operates as a defence in whole or in part to the action (Annual Practice, 1909, pp. 249, 301); *Stooke* v. *Taylor* (1880), 5 Q. B. D. p. 575. A counter-claim is wider in its scope. It operates as a cross-action and it need not be in any way analogous to the plaintiff's action: *Beddall* v. *Maitland* (1881), 17 C. D. p. 181. To such counter-claim the Statute of Limitations can of course be pleaded, and it can be pleaded also to a claim raised as a

statutory set-off: *Remington* v. *Stevens* (1748), 2 Str. 1271; *Rawley* v. *Rawley* (1876), 1 Q. B. D. p. 463, C. A.; see *Smith* v. *Betty*, [1903] 2 K. B. 317, C. A. Express provision is made to this effect by the Statute of Frauds Amendment Act, 1828:—

9 Geo. 4, c. 14, s. 4. Statute applies to set-off.

> "The said recited Acts [*i.e* 21 Jac. 1, c. 16, and the Irish Act, 10 Car. 1, sess. 2, c. 9] and this Act shall be deemed and taken to apply to the case of any debt on simple contract alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise."

The Irish Act, 10 Car. 1, sess. 2, c. 9, and this section, as regards Ireland, have been repealed (*supra*, p. 197), and corresponding provision as to set-off is made by the Ir. C. L. P. A., 1853 (16 & 17 Vict. c. 135), s. 26.

But the statute is not a bar to a set-off, or (it would seem) to a counterclaim, unless the six years have expired before the action is brought. The set-off is substituted for a cross-action which is supposed to be brought at the time of the commencement of the plaintiff's action: *per* Campbell, C.J., in *Walker* v. *Clements* (1850), 15 Q. B. 1046; *Re Ballard*, W. N. (1890), p. 64; see *Ord* v. *Ruspini* (1797), 2 Esp. 569.

Where A. has delivered goods to B. more than six years ago, and within the six years B. delivers goods to A., A. can meet B.'s claim for the price of the goods by proving an agreement that the later goods should be taken in exchange for the earlier ones, although a set-off in respect of the price of the earlier ones would be barred: *Moore* v. *Strong* (1835), 1 Bing. N. C. 441.

(28) *Solicitors.*

(i.) *Accounting for Client's Money.*

Solicitor not in general a trustee.

A solicitor is not in general a trustee for his client of moneys received on his behalf, and the right to an account against the solicitor is barred in six years: *Re Hindmarsh* (1860), 1 Dr. & Sm. 129; *Watson* v. *Woodman* (1875), 20 Eq. 721, at p. 731. If, however, the solicitor is employed to manage funds on behalf of his client, and is left to exercise his own discretion as to choice of investment, he becomes a trustee of the funds and he is not entitled to the protection of the Limitation Act, 1623, except by virtue of the Trustee Act, 1888, s. 8: *Burdick* v. *Garrick* (1870), 5 Ch. 233; *Gray* v. *Bateman*, 21 W. R. 137; *Power* v. *Power*, 13 L. R. Ir. 281; see *infra*, p. 278.

(ii.) *Negligence.*

Negligence by solicitor.

An action against a solicitor for negligence in the performance of his professional duties would formerly have been framed either in contract (*assumpsit*) or in tort (case), and in either form would have been barred in six years: *contract*, *Short* v. *M'Carthy* (1820), 3 B. & A. 626; *Brown* v. *Howard* (1820), 2 Br. & B. 73; *tort*, *Howell* v. *Young* (1826), 5 B. & C. 259; *Smith* v. *Fox* (1848), 17 L. J. Ch. 170. And the same limit now applies to an action founded on negligence: *Hughes* v. *Twisden* (1886), 55 L. J. Ch. 481; including an action for negligence in respect of an investment which has been selected or approved by the client: *Dooby* v. *Watson* (1888), 39 C. D. 178. But if money is left in a solicitor's hands for investment at his discretion, then, as just stated, he is a trustee of the money, and, in the event of the money being lost by his negligence, he is liable as a trustee: *Dooby* v. *Watson*; *Smith* v. *Pococke* (1854), 2 Drew. 197; *Craig* v. *Watson* (1845), 8 Beav. 427; *infra*, p. 278.

Statute runs from negligence.

The parties to a contract impliedly undertake for due diligence in the performance of it. Hence negligence is a breach of the contract, and the statute runs forthwith, although the special damage may not arise, or the negligence may not be discovered, till later. And where there is a contractual relation between the parties, it makes no difference in this respect whether the action is brought in contract or in tort: see *per* Holroyd, J., in *Howell* v. *Young* (1826), 5 B. & C. 259. Hence, in an action for negligence by a client against his solicitor, the act of negligence gives the date of accrual of the cause of action, and time runs from such act, and not from its discovery by the client: *Short* v. *M'Carthy* (1820), 3 B. & A. 626; *Wood* v. *Jones* (1889), 61 L. T. 551—unless it has been fraudulently concealed: *Brown* v. *Howard* (1820), 2 Br. & B. 73—or from the time when damage results: *Howell* v. *Young* (*supra*); *Smith* v. *Fox* (1848), 6 Hare, 386. But where the negligence lay in failure to give notice to trustees of an assignment of an equitable interest in a trust fund, and a subsequent incumbrancer by giving notice gained priority, the act of negligence was not complete till such subsequent notice, from the date of which accordingly the statute ran: *Bean* v. *Wade* (1885), C. & E. 519.

(iii.) *Costs.*

Litigious costs.

A solicitor who is retained to prosecute or defend an action enters into an entire contract to carry on the proceedings until the action is finally terminated, and he cannot sue for his costs until that time has arrived: *Harris* v. *Osbourn* (1834), 2 C. & M. 629; *Whitehead* v. *Lord* (1852), 7 Ex. 691. And though he can put an end to the contract for good cause—as for the failure of the client to provide money for immediate disbursements: *Rowson* v. *Earle* (1829), 1 Moo. & M. 538—yet he cannot do so without reasonable cause and without reasonable notice: *Underwood* v. *Lewis*, [1894] 2 Q. B. 306, C. A.; *Nicholls* v. *Wilson* (1843), 11 M. & W. 106. Hence, items in the bill of costs more than six years old are not excluded, if the suit terminated within six years: *Martindale* v. *Falkner* (1846), 2 C. B. 706. The right to costs arises on termination of the suit by judgment: *Rothery* v. *Munnings* (1830), 1 B. & Ad. 15; unless there is an appeal, and then the appeal is a continuation of the proceedings in the original suit, and prevents the statute running: *Harris* v. *Quine* (1869), L. R. 4 Q. B. 653. But when the suit is at an end, a subsequent item in the bill does not take the rest of the bill out of the statute: *Rothery* v. *Munnings* (*supra*).

Proceedings in equity, etc.

The rule that the right to sue for costs does not arise until the determination of the proceedings only applies to ordinary actions, whether at common law or in equity, in which the object is to obtain a verdict or judgment, and in which no ulterior proceedings are necessary. It does not apply to equity matters where the obtaining of the judgment is only one part of the cause, and the working out of the decree requires further steps to be taken. In such cases the solicitor is entitled to treat each part as a separate and distinct transaction, and the statute runs against him accordingly; and it is the same in other proceedings, such as proceedings in bankruptcy and winding up, which are capable of separation into distinct parts: *Re Hall and Barker* (1878), 9 C. D. 538; also in arbitrations, if the course of the proceedings is such as to admit of natural breaks: *Re Romer and Haslam*, [1893] 2 Q. B. 286. And see *Re Cartwright* (1873), 16 Eq. 469.

Country solicitor and London agent.

It has been held that in accounts between a country solicitor and his London agent successive bills delivered can be treated as distinct, though relating to one cause in progress: *Re Nelson*,

Son, and Hastings (1885), 30 C. D. 1, C. A.; but that case really turned upon a question of fact, and the earlier accounts were each settled as separate accounts by agreement between the parties, so as to make each a final bill of costs: see *Re Romer and Haslam* (*supra*). In non-litigious matters, too, separate bills may be sent in at natural breaks in the business, and hence later items cannot be relied on to save earlier ones: *Phillips* v. *Broadley* (1846), 9 Q. B. 744.

Statute runs from completion of the work though action deferred.

Under the Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37, a solicitor cannot commence an action for the recovery of any fees, charges, or disbursements for any business done by him until the expiration of one month after delivery of his bill; but this provision does not prevent the cause of action from arising immediately the work has been done. It only affects the enforcement of the remedy. Hence the statute runs on the completion of the work, and not from the end of one month after delivery of the bill: *Coburn* v. *Colledge*, [1897] 1 Q. B. 702, C. A.

As to costs due from poor law guardians: *vide supra*, p. 232. As to taxation of statute-barred costs: *vide supra*, p. 210. As to re-opening settled accounts for costs: *vide supra*, p. 216.

Charging order for costs.

Where a petition was brought under the Solicitors Act, 1862 (23 & 24 Vict. c. 127), s. 28, to obtain a charge for costs on property preserved in proceedings taken on behalf of an infant and adopted by him on attaining twenty-one, a receiver being in possession throughout, it was held that the statute had not run against the solicitor, though no step had been taken within six years: *Baile* v. *Baile* (1872), 13 Eq. 497. A charging order cannot be made for costs which are statute-barred: *supra*, p. 210.

(29) *Work done.*

Completion of work.

In an action for work done, the cause of action accrues when the work is completed; and the rule applies though the work is done for a public body, and no steps have been taken to raise funds for payment: *Emery* v. *Day* (1834), 1 C. M. & R. 245. Under special circumstances, however, the statute may not run until there are assets for payment—as where money raised by a company is by statute to be applied to pay certain creditors: *Re Kensington Station Act* (1875), 20 Eq. 197; or where solicitors have delivered up documents to an official liquidator on his

undertaking to pay their costs out of the first moneys in his hands: *Re Gloucester, etc., Ry. Co.* (1860), 2 Giff. 47—or until the deficiency of the primary fund is ascertained: *Hunter* v. *Hunter* (1868), Ir. R. 3 C. L. 138.

(30) *Workmen.*

Employers' Liability Act, 1880.

An action is not maintainable under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), unless notice of the injury is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death; but in case of death, the want of notice is no bar to the maintenance of the action, if the judge is of opinion that there was reasonable excuse for such want of notice (s. 4).

Workmen's Compensation Act, 1906.

Proceedings for the recovery of compensation under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), are not maintainable unless notice of the accident has been given as soon as practicable after the happening thereof, and before the workman has voluntarily left the employment in which he was injured; and unless the claim for compensation in respect of such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death; but there is a proviso saving (*a*) the case of want of notice of the accident, and (*b*) the case where the failure to make the claim within the period above specified is due to mistake, absence from the United Kingdom, or other reasonable cause: sect. 2.

Unlawful deduction from wages.

The Truck Act, 1896 (59 & 60 Vict. c. 44), s. 4, imposes a six months' limitation on proceedings by a workman to recover sums deducted by his employer contrary to the Act, the period to be reckoned from the date of deduction.

CHAPTER V.

CLAIMS IN EQUITY.

How time a bar to equitable claims.

An equitable claim may be expressly barred by statute. Thus, under sect. 24 of the R. P. L. A., 1833, a claim to land or rent in equity is subject to the same limitation as a claim at law. In the absence of such statutory limitation the operation of time in barring claims in equity depends either upon the analogy of the Statute of Limitations, or upon the doctrine of laches—a doctrine adopted by Courts of Equity with a view to discouraging stale demands.

Section I.—Where Equity acts in Analogy to the Statute.

Cases analogous to those within statute.

Where there is no statutory bar upon the proceedings in equity, but the subject matter of the claim falls within one of the Statutes of Limitation—as where it is in respect of a simple contract debt—so that the claim would be barred if the proceedings were at law, the claim is also barred in equity. "Courts of Equity have constantly guided themselves by the principle that, wherever the legislature has limited a period for law proceedings, equity will, in analogous cases, consider the equitable rights as bound by the same limitation": *per* Lord Redesdale, in *Hovenden* v. *Annesley* (1806), 2 Sch. & Lef. 607, at p. 632; see *Smith* v. *Clay* (1767), 3 Bro. C. C. 639 n.; *Bond* v. *Hopkins* (1802), 1 Sch. & Lef. 413, at p. 429; *Cholmondeley* v. *Clinton* (1820), 2 Jac. & W. 1, at p. 151. In *Cholmondeley* v. *Clinton* (1821), 4 Bligh, 1, at p. 119, Lord Redesdale went so far as to say that the Statute of Limitations was intended to govern equitable as well as legal claims, and that Courts of Equity, in applying it, acted in obedience to the statute. The true principle, however, is that, "where the remedy in equity is correspondent to the remedy at law, and the latter is subject to a limit in point of time by the Statute of Limitations, a Court of Equity acts by analogy to the statute, and imposes on

the remedy it affords the same limitation. But if any proceeding in equity be included in the words of the statute, then a Court of Equity, like a court of law, acts in obedience to the statute": *per* Lord Westbury, C., in *Knox* v. *Gye* (1872), L. R. 6 H. L. 656, at p. 674. But if no analogy is properly applicable, a Court of Equity does not adopt an express time limit in imitation of the statute. It does not, for instance, extend the limitations on actions in respect of real estate to personal estate, and hence there is no specific limit on the arrears of interest which may be recovered in respect of a mortgage of a reversionary interest in personal estate: *Mellersh* v. *Brown* (1890), 45 C. D. 225; *supra*, p. 180. Though after twenty years there would be a presumption of payment. Nor does it apply six years as a limitation to specific performance on the analogy of breach of contract: *Talmarsh* v. *Mugleston* (1826), 4 L. J. O. S. Ch. 200.

Section II.—Where no Statutory Limitation is applicable.

(1) *The Doctrine of Laches.*

Effect of delay in equity.

Although no statutary limitation may be applicable, either expressly or by way of analogy, yet equity recognizes that it would be unjust to allow a claim to be asserted after an undue lapse of time, and a plaintiff who has brought himself within this principle is said to be barred by his laches. "A Court of Equity, which is never active in relief in matters against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith, and reasonable diligence; where these are wanting the Court is passive and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limit to suits in this Court": *per* Lord Camden, in *Smith* v. *Clay* (1767), 3 Bro. C. C. 639 n.

(i.) *Meanings of Acquiescence distinguished.*

Acquiescence during violation of right;

In the passage just quoted the effect of laches is ascribed to acquiescence, but this term is used in two senses. If A. stands by while he sees the violation of his right in progress, and takes

no steps to interfere, he is said to acquiesce in the violation, and he may be thereby debarred from his remedy in respect of it. This is acquiescence in the strict sense, but its effect has nothing to do with the lapse of time, and it has no relation to laches. In another sense, acquiescence is used to denote that some equitable right of A. has been violated; as where he has been induced to make a gift by undue influence, or where he is a *cestui que trust* and his trustee has purchased the trust property; and that after the influence has ceased, or the violation has been brought to his knowledge, he assents to the continuance of the state of affairs resulting from the violation—to the retention of the gift by the donee or of the property by the trustee. The lapse of time without proceedings being taken by A. is evidence of such assent, and upon acquiescence of this latter kind the doctrine of laches is based.

and after violation.

Acquiescence in the strict sense implies either that the party acquiescing has abandoned his right, or that he is estopped by his conduct from asserting it. "If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word 'acquiescence'": *per* Lord Cottenham, C., in *Duke of Leeds* v. *Earl of Amherst* (1846), 2 Ph. p. 124. "Acquiescence may be defined as quiescence under such circumstances as that assent may reasonably be inferred from it, and is no more than an instance of the law of estoppel by words or conduct. But when once the act is completed without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined on very different legal considerations. A right of action has then vested in him which, at all events as a general rule, cannot be divested without accord and satisfaction or release under seal": *De Bussche* v. *Alt* (1878), 8 C. D. 286, C. A.; *cf.* *Kent* v. *Jackson* (1851), 14 Beav. 367.

Acquiescence proper.

The estoppel which arises from standing by rests upon the ground that it is fraudulent for one person to assert his right after having encouraged another to act upon the belief that it does not exist or has been abandoned: see *Savage* v. *Foster* (1722), 9 Mod. 35; 1 Wh. & T. L. C., 7th ed. p. 455. The conditions for the application of the doctrine were stated by Fry, J., in *Willmott* v. *Barber* (1880), 15 C. D. p. 105. If A. has

Estoppel by "standing by."

stood by while his right is infringed by B., the estoppel arises against A. :—(1) if B. has made a mistake as to his legal right: *cf. Ramsden* v. *Dyson* (1865), L. R. 1 H. L. 129; (2) if B. has expended money, or done some act, on the faith of his mistaken belief: *Dann* v. *Spurrier* (1802), 7 Ves. p. 235; *Rochdale Canal Co.* v. *King* (1851), 2 Sim. N. S. 78; *Archbold* v. *Scully* (1861), 9 H. L. C. p. 383; (3) if A. knew of his own right—"if he does not know of it he is in the same position as [B.], and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights"; (4) if A. knew of B.'s mistaken belief; (5) if A. has encouraged B. in his expenditure of money or other act, either directly, or by abstaining from asserting his legal right: see *Civil Service, etc., Association* v. *Whiteman* (1899), 68 L. J. Ch. 484.

Acquiescence proper is a bar notwithstanding statute.

In cases where the doctrine of acquiescence in this sense applies, A.'s right, whether it is legal or equitable, is barred by his acquiescence, even though a statutory limitation is applicable, and the statutory period has not run; and the jurisdiction of equity to bar the right on this ground is expressly preserved, as regards claims to land or rent, by sect. 27 of the R. P. L. A., 1833:—

R. P. L. A., 1833, s. 27. Effect of acquiescence preserved.

> "Nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of Courts of Equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this Act."

Acquiescence in second sense, or laches, does not shorten statutory period.

Where, however, the violation of the right has been completed under such circumstances that acquiescence in the strict sense is not to be imputed to the owner of the right, but he forbears for a long time to seek redress after he has been in a position to do so—where, in the words of Lord Camden, in *Smith* v. *Clay* (*supra*, p. 252), he sleeps upon his right—there is a case of acquiescence in the second sense, and such acquiescence will constitute laches. If, however, the right of action is subject, expressly or by analogy, to a statutory limitation, acquiescence in this sense does not have the effect of shortening the time within which the plaintiff can sue. A party who has not abandoned his right cannot be said to be in delay because he takes advantage of the full period which the law allows, and does not bring his action until that period is on the point of expiring. "So far as laches is a defence," said Lord Wensleydale, in *Archbold* v. *Scully* (1861), 9 H. L. C. p. 383, "I take

it that where there is a Statute of Limitations, the objection of simple laches does not apply until the expiration of the time allowed by the statute."

"Where one party invades the right of another, that other does not, in general, deprive himself of the right of seeking redress merely because he remains passive; unless, indeed, he continues inactive so long as to bring the case within the purview of the Statute of Limitations: *Rochdale Canal Co.* v. *King* (1851), 2 Sim. N. S. p. 89, *per* Lord Cranworth, V.C.

Thus mere delay, short of the statutory period of limitation, is no bar to a claim to recover a specialty debt (*Re Baker* (1881), 20 C. D. 230, C. A., where eighteen out of the twenty years had elapsed); or to a claim to set aside a deed as fraudulent under 13 Eliz. c. 5: *Three Towns Banking Co.* v. *Maddever* (1884), 27 C. D. 523, C. A.; *cf. Penny* v. *Allen* (1857), 7 D. M. & G. 409, at p. 426; *L. C. & D. Ry. Co.* v. *Bell* (1882), 47 L. T. 413, at p. 415; or to a claim on a bill of exchange: *Glyn* v. *Hood* (1860), 1 D. F. & J. 334.

And since trustees are now entitled to avail themselves of the statute, the same rule must apply to a claim by a *cestui que trust* against his trustee. This was not noticed in *Re Taylor* (1900), 81 L. T. 812, where a trustee in whose favour time had not run under the Trustee Act, 1888, s. 8, by reason of the plaintiff's interest being a future interest at the time of the breach of trust, but whose position had been prejudiced by the plaintiff omitting to sue earlier, escaped on the ground of the plaintiff's laches.

(ii.) *The Elements of Laches.*

Laches.

The doctrine of laches, therefore, is confined to equitable claims which are subject to no statutory bar either expressly or by analogy. The term "laches" denotes that there has been such delay as either by itself, or in connection with other circumstances, makes it inequitable to enforce the claim. But the delay and the circumstances which will be held to constitute laches vary with the nature of the claim. It seems correct to say—though this has not always been recognized—that to all equitable claims, except those founded on breach of express trust, time in itself, if unduly prolonged, is as much a bar as an express statutory bar; and though, in the absence of legislative enactment, Courts of Equity have abstained from

fixing a specific limit (see *per* Lord Camden, in *Smith* v. *Clay* (1767), 1 Bro. C. C. 639 n.), no equitable claim is likely to be entertained if the party entitled delays to put it in suit for twenty years after he has been in a position to do so. The claim is then "stale" and is unenforceable.

But this limit of twenty years is only mentioned as the maximum. Equitable relief will usually be refused after a much shorter delay, and the delay permissible in any particular case depends (*a*) on the general maxim that a claimant who seeks for relief in equity must come promptly; and (*b*) upon the particular circumstances associated with the delay which make the enforcement of the claim inequitable—chiefly the acquiescence of the claimant, using "acquiescence" in its second sense (*supra*, p. 253), or the changed position of the defendant. And it is such acquiescence or change of position which is usually operative. The Court does not, in ordinary cases, insist on the immediate bringing of the action; in other words, the rule that claims in equity must be made promptly is not applied with strictness. Attention is paid to the circumstances accompanying the delay rather than to the delay itself. In certain cases, however, such as claims to specific performance or to rescission of contracts, greater prominence is given to the rule requiring promptness, and a comparatively short delay will be an absolute bar to the claim. Laches, then, exists:—

(1) Where there has been delay so excessive as to make the claim stale;

(2) Where the plaintiff has not come with due promptitude, and at the same time the delay either constitutes evidence of acquiescence, or has produced such a change in the defendant's position that it would be unjust to him to enforce the claim;

(3) Where the case is such as to call for special promptitude in making the claim, and the plaintiff does not make it immediately upon being in a position to do so.

Acquiescence as an element in laches.

Of the various elements in laches special weight is given to acquiescence—in the second sense—and this has been sometimes treated as the sole element. "The true operation of length of time is by way of evidence": *per* Erskine, L.C., in *Morse* v. *Royal* (1806), 12 Ves. p. 374; *i.e.* evidence of acquiescence. "Length of time," said Turner, L.J., in *Life Association of Scotland* v. *Siddal* (1861), 3 D. F. & J. p. 72,

"where it does not operate as a statutory or positive bar, operates, as I apprehend, simply as evidence of assent or acquiescence. The two propositions of a bar by length of time and by acquiescence are not, as I conceive, distinct propositions. They constitute but one proposition, and that proposition when applied to a case of this description"—that is, breach of trust—"is that the *cestui que trust* assented to the breach of trust."

Defendant's change of position.

But, as already stated, the Court has regard also to the change which the delay may have caused in the position of the defendant. Thus he may have lost the evidence necessary to meet the claim. "A Court of Equity will not allow a dormant claim to be set up when the means of resisting it, if unfounded, have perished": *per* Lord Campbell, C., in *Bright* v. *Legerton* (1861), 2 D. F. & J. p. 617; see *Mathew* v. *Brise* (1851), 14 Beav. p. 346. Or he may have fixed his mode of life upon the assumption that the transaction which the plaintiff seeks to impeach was valid: see *Turner* v. *Collins* (1871), 7 Ch. 329; *Allcard* v. *Skinner* (1887), 36 C. D. p. 192, C. A.; and this will be a strong reason for not disturbing him. And generally the plaintiff will be barred by his laches if, knowing that there is a question as to his rights, he refrains from raising it, and leaves others to act upon the assumption that the claim has been abandoned: *Stone* v. *Godfrey* (1854), 5 D. M. & G. 76.

Rule in *Lindsay Petroleum Co.* v. *Hurd.*

Both the foregoing considerations—delay as evidence of acquiescence, and delay as involving a change in the position of the defendant—are recognized as forming the foundation of the equitable bar in the judgment of Lord Selborne, in *Lindsay Petroleum Co.* v. *Hurd* (1874), 5 P. C. 221, at p. 239: "The doctrine of laches in Courts of Equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by a Statute of Limitations, the validity

of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy." In *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, p. 1279, Lord Blackburn, after quoting this passage, said: "I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it": see *Re Sharpe*, [1892] 1 Ch. 154, p. 168, C. A.; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, p. 210, C. A.

(iii.) *Whether Laches restricted to Executory Interests.*

Suggested distinction between executed and executory interests: *Clarke* v. *Hart.*

In *Clarke* v. *Hart* (1858), 6 H. L. C. 633, Lord Chelmsford, C., suggested a division of equitable interests into "executed" and "executory," and he treated claims in respect of executed interests as being outside the doctrine of laches altogether, and as being liable to be lost only by abandonment or estoppel. "Where," he said, "a plaintiff is obliged to apply for the peculiar relief afforded by a Court of Equity to enforce the performance of an agreement, or to declare a trust, or to obtain any other right of which he is not in possession and which may be described as an executory interest, it is an invariable principle of the Court that the party must come promptly, that there must be no unreasonable delay. And if there is anything that amounts to laches on his part, Courts of Equity have always said we will refuse you relief. With regard to interests which are executed the consideration is entirely different. There mere laches will not of itself disentitle the party to relief by a Court of Equity; but a party may by standing by, as it has been metaphorically called, waive or abandon any right which he may possess and which, under the circumstances, therefore, a Court of Equity may say he is not entitled to enforce." And Lord Chelmsford treated the question of abandonment as depending upon estoppel, so that

in determining what conduct would bar the plaintiff, the principle of the estoppel cases of *Pickard* v. *Sears* (1837), 6 A. & E. 469, and *Freeman* v. *Cooke* (1848), 2 Ex. 654, was applicable.

Explanation of *Clarke* v. *Hart*.

The judgment of Lord Chelmsford in *Clarke* v. *Hart* is correct in affirming that in certain classes of equitable claims—which may be described as concerned with executory interests—special promptitude is required, and in such cases the failure to sue with the requisite promptitude is properly described as laches; but it is a mistake to suppose that the doctrine of laches is confined to such cases, and that a claim, for instance, to the benefit of an express trust—which is certainly an executed interest—cannot be defeated on the ground of laches. In *Clarke* v. *Hart* the plaintiff was not seeking the aid of equity to enforce or rescind a contract, or to obtain any other relief which required him to come with special promptitude. He was seeking equitable relief in respect of an existing partnership interest. The delay had amounted only to four years, and there had been no acquiescence on the part of the plaintiff or change in the position of the defendants so as to make it inequitable for the Court to interfere. There was in fact no laches, and so far as laches was concerned the plaintiff was entitled to succeed. But if he had been chargeable with acquiescence in the proper sense (*supra*, p. 253); if he had stood by while the violation of his right was in progress and had not complained; he would have forfeited his right on this ground, quite independently of laches. This, however, was not the case, and the plaintiff, being clear both of laches and of acquiescence (in the proper sense) obtained the relief he sought. This, it is believed, is the explanation of Lord Chelmsford's judgment. The case of *Clarke* v. *Hart* is not to be taken as impugning the well-established principle that all claims in equity, which are not subject to a statutory limitation, are liable to be barred by laches.

(iv.) *Knowledge and Freedom Essential.*

Knowledge necessary for acquiescence.

In so far as delay is evidence of acquiescence (using this term in the second sense), it cannot operate in the absence of knowledge of his rights on the part of the plaintiff. "In order that the remedy should be lost by laches or delay, it is,

if not universally, at all events ordinarily necessary, that there should be sufficient knowledge of the facts constituting the title to relief": *Lindsay Petroleum Co.* v. *Hurd* (1874), L. R. 5 P. C. p. 241. Without knowledge, indeed, there can be no acquiescence. "Parties cannot be said to acquiesce in the claims of others, unless they are fully cognizant of their right to dispute them": *per* Turner, V.C., in *Marker* v. *Marker* (1851), 9 Hare, p. 16; see *Burrows* v. *Walls* (1855), 5 D. M. & G. 233; *Jones* v. *Higgins* (1866), 2 Eq. 538.

And knowledge is important, not only as forming an element in acquiescence, but also as making the plaintiff responsible for any change which may have taken place to the prejudice of the defendant. Any change which occurs in the position of the parties or the state of the property after such notice or knowledge as to make it inequitable to lie by tells much more against the party in delay than a similar change before he was in delay would do: *per* Lord Blackburn, in *Erlanger's Case* (1878), 3 App. Cas. 1218, at p. 1279.

In general knowledge of facts sufficient.

For a party to have knowledge of his rights, he should in strictness be aware of the facts and of their legal consequences. "In equity it is considered, as good sense requires it should be, that no man can be held by any act of his to confirm a title, unless he was fully aware at the time, not only of the fact upon which the defect of title depends, but of the consequence in point of law; *per* Leach, M.R., in *Cockerell* v. *Cholmeley* (1830), 1 R. & M. 418, at p. 425. And the Court has power to relieve against mistakes of law as well as against mistakes of fact: *Stone* v. *Godfrey* (1854), 5 D. M. & G. 76, at p. 90; *Re Saxon Life Assurance Society* (1862), 2 J. & H. 408, at p. 412. Thus where a plaintiff has been mistaken as to his rights, it may be that time will only run against him from the discovery of his mistake: *Brooksbank* v. *Smith* (1836), 2 Y. & C. Ex. 58; *Denys* v. *Shuckburgh* (1840), 4 Y. & C. Ex. 42. But generally, when the facts are known from which a right arises, the right is presumed to be known (*Stafford* v. *Stafford* (1857), 1 De G. & J. 193, at p. 202), and it is sufficient that the plaintiff has knowledge of the facts which constitute the title to relief: *Lindsay Petroleum Co.* v. *Hurd* (1874), 5 P. C. p. 241; see *Molloy* v. *Mutual Reserve Life Insurance Co.* (1906), 94 L. T. 756, C. A.

When laches not imputed.

And similarly laches is not imputed while the party is not ascertained: *Cator* v. *Croydon Canal Co.* (1841), 4 Y. & C. Ex.

405; or is under the disability of infancy or lunacy: *March* v. *Russell* (1837), 3 My. & Cr. 31; *Young* v. *Harris* (1891), 65 L. T. 45; or while his interest is future and he is under no present obligation to interfere: *Life Association of Scotland* v. *Siddall* (1861), 3 D. F. & J. p. 73; *Kirwan* v. *Kennedy* (1869), Ir. R. 3 Eq. 472, p. 484; *Bennett* v. *Colly* (1833), 2 My. & K. 225; *Mehrtens* v. *Andrews* (1839), 3 Beav. 72; *Butler* v. *Carter* (1868), 5 Eq. 276; *contra*, *Browne* v. *Cross* (1851), 14 Beav. 105; or, where a transaction is impeachable on the ground of undue influence, until such influence has ceased: *Gregory* v. *Gregory* (1815), Coop. 201; *Roberts* v. *Tunstall* (1844), 4 Hare, 257; *Allcard* v. *Skinner* (1887), 36 C. D. 145, p. 163, C. A. An absolute conveyance, really made to secure a debt, has been set aside after seventeen years, where the parties remained in ignorance of their rights, and under undue influence: *Purcell* v. *M'Namara* (1804), 14 Ves. 91.

Effect of restraint on anticipation

Where a claim is made by a married woman in respect of property which is subject to a restraint on anticipation, the existence of the restraint does not exempt her from the ordinary consequences of lapse of time and acquiescence, even though the claim is founded upon a breach of trust: *Derbishire* v. *Home* (1853), 3 D. M. & G. 80, at p. 102; nor does it prevent her from compromising a suit as to the corpus of her estate: see *Wilton* v. *Hill* (1855), 25 L. J. Ch. 156, at p. 158; though where she has made a conveyance in breach of the restraint, the conveyance is not validated by lapse of time: *Heath* v. *Wickham* (1880), 5 L. R. Ir. 285, C. A. But acquiescence will not be imputed where the real ground of the married woman not having sued earlier is that she was bound by covenant not to do so: *Sprange* v. *Lee*, [1908] 1 Ch. 424, p. 431.

(v.) *Lapse of Time in Itself a Bar.*

Whether mere lapse of time a bar.

In strictness it seems to follow from the foregoing authorities that, save in cases where special promptitude is required as a condition of relief, the lapse of time is in itself no bar to a claim in equity. It is only a bar so far as it raises an inference, either alone or in conjunction with other circumstances, of some matter which renders the claim unenforceable; such as abandonment of the right, or acquiescence, or a balance of convenience in favour of its non-enforcement. And accordingly in *Pickering* v. *Stamford* (1793), 2 Ves. Jun. 272, 581, a bill to

have a bequest for charitable purposes declared void was allowed after thirty-five years, there being no presumption of a release by the next-of-kin or any difficulty as to accounts.

But where there has been great delay the Court does not look for actual evidence of acquiescence or other circumstances, and in practice the delay itself is a bar to equitable relief. In the case of money claims and claims to account the lapse of twenty years raised, before the Civil Procedure Act, 1833, a presumption of satisfaction: *Pomfret* v. *Windsor* (1752), 2 Ves. Sen. p. 477, note; *Jones* v. *Turberville* (1792), 2 Ves. Jun. 11; *Campbell* v. *Graham* (1831), 1 R. & M. 453. But, apart from this, a creditor's bill against residuary legatees was in *Hercy* v. *Dinwoody* (1793), 2 Ves. Jun. 87, dismissed after thirty-three years' delay on the ground of gross laches. "Independent of the question of satisfaction," said Arden, M.R., "but on account of the very neglect, and the mischief and disturbance that may arise to families, though the presumption of satisfaction is not so strong, yet the laches and neglect may be such as to make it a matter of public policy that the party guilty of it shall abide by the consequences." In *Harcourt* v. *White* (1860), 28 Beav. 303, mere negligence for nearly twenty years was held to bar a claim to an account of timber improperly cut. "In this case," said Romilly, M.R., "there is no express or active acquiescence; the question of acquiescence, therefore, is confined solely to what may be inferred from the length of time which has elapsed; in other words, the case is one of negligence to enforce her rights. The Court of Chancery, very wisely in my opinion, wholly independently of any Statute of Limitations, but simply as enforcing one of the doctrines of equity, is averse to the assertion of stale demands": *cf. Blake* v. *Gale* (1885), 31 C. D. 196.

Hence it may be taken that (as suggested by Hart, L.C., in *Byrne* v. *Frere* (1828), 2 Moll. p. 176), in cases of purely equitable claims, twenty years is an absolute bar, and where this period has elapsed, the mere delay renders the claim unenforceable, unless infancy or some other disqualifying circumstance has lasted through substantially the whole of the time. Any shorter delay will depend for its effect on the principles above stated. Laches, however, is not imputable where the fund available for satisfying the claim has not been dealt with in any way, but is still in the hands of trustees or in Court: *Re Ashwell's Will* (1859), Johns. 112.

Claims by a company.

If the effect of time depended only upon acquiescence there would sometimes be a difficulty in placing any bar upon claims by a company. Where an act of directors is beyond their own powers, but is capable of ratification by the shareholders, then such ratification may be presumed from their acquiescence; and for this purpose acquiescence does not necessarily imply active and intelligent consent. If there is notice of the transaction and no opposition, acquiescence may be imputed to a body of shareholders; and upon this ground the right of a liquidator to have a shareholder, who had been removed from the register by an *ultra vires* act of the directors, replaced on the list of contributories, was held to be barred by the lapse of eighteen years: *Evans* v. *Smallcombe* (1868), L. R. 3 H. L. 249. Though it may be that, since a company cannot always act quickly, mere delay will not operate so strongly against a company as against individuals: *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas., p. 1280. Where, however, the claim is in respect of a misapplication of funds by a director, which neither the directors nor the company could authorize or ratify, a bar by time is impossible if this only takes effect as proof of acquiescence: see *Re Sharpe*, [1892] 1 Ch. 154, C. A. Such a case might now be within the statute by virtue of sect. 8 of the Trustee Act, 1888. But, apart from this, an excessive delay in enforcing the claim would render it "stale," and so unenforceable; and certainly if, in addition to the delay, there had been such a change in the position of the defendant as to make the enforcement of the claim inequitable: see *Re Sharpe*.

(2) *Application of the Doctrine of Laches.*

The above are the general principles upon which equity refuses relief on the ground of delay. Their application to particular claims is illustrated by the following cases:—

(i.) *Purchases by Trustees, etc.*

Purchases by trustees.

Upon a purchase of property by a trustee or other person in a fiduciary relation the *cestui que trust* is entitled to the assistance of equity to have the purchase set aside: *Thompson* v. *Eastwood* (1877), 2 App. Cas. p. 236; *Silkstone, etc., Coal Co.* v. *Edey*, [1900] 1 Ch. 167; but the claim will fail if there has been such delay as to show acquiescence, or the delay alone, if excessive, will be a bar. "The principle of the decisions is

that the injured party has waived his right to relief:" *Roberts* v. *Tunstall* (1844), 4 Hare, 257, per Wigram, V.C., at p. 266. In *Morse* v. *Royal* (1806), 12 Ves. 355, the lapse of twenty years was, under the circumstances, treated as evidence of abandonment; in *Gregory* v. *Gregory* (1815), Coop. 201, eighteen years. "Can it be said," observed Grant, M.R., in the latter case, "that there is no distance of time at which circumstances originally entitling a party to relief may be considered as waived or abandoned? Certainly there may. It is only a rule of equity that a trustee shall not purchase. In all the cases in which length of time has not been allowed to operate against the title to relief, it has been shown that there has been a continuance of the circumstances under which the transaction first took place, as of the distress of the parties, or of the improper influence used, or of some other circumstances."

In *Roberts* v. *Tunstall* (*supra*), where a tenant for life with a limited power of appointment had purchased the reversion from the objects of the power, a delay of seventeen years was treated as a waiver, and the poverty of the beneficiaries was in itself no excuse, though it was a circumstance to be taken into account. "Where," said Wigram, V.C., "a transaction of this kind has been brought about by misrepresentation, concealment, or undue influence, or where the vendor is dependent on the bounty of the purchaser, the Court considers that the right of the vendor to rescind the sale exists without the imputation of laches, until such time as it is shown that he was released from the position in which he was placed by those circumstances. The poverty of a vendor, added to the other circumstances, is also a material ingredient in such a case"; but otherwise, the Vice-Chancellor held, poverty does not prevent waiver. In *Watson* v. *Toone* (1820), 6 Mad. 153, a purchase made by an executor in 1790 was set aside in 1820 on a bill filed in 1806; but this was on the ground of concealment, and of the position of the plaintiff, who was an infant remainderman in 1790, and did not come of age till 1803. In the absence of concealment relief would not have been given. "If," said Leach, V.C., "an executor, ignorant of the rule of this Court, openly purchased assets of his testator with the full approbation of the parties then presently interested, the Court would not in that case press the equitable rule against him after such a length of time."

In *Baker* v. *Read* (1854), 18 Beav. 398, relief against a

purchase of a testator's estate by the executor at an under value, was refused after seventeen years, solely on the ground of the delay. "I am of opinion," said Romilly, M.R., "that the plaintiffs are prevented having any relief solely by the lapse of time which has occurred since the transaction complained of took place. . . . I think I am bound by the rules of the Court, which require promptness and despatch in applying to this Court for relief, to say that after the lapse of time which has occurred in this case, no relief can be afforded." But the general tendency is to adhere to the doctrine of waiver. Thus, while a claim by a client to set aside a sale to his solicitor has been held to be barred in eighteen years (*Champion* v. *Rigby* (1830), 1 R. & M. 539), yet mere length of time has been said to be no bar, unless accompanied by circumstances which lead to the inference that the client was aware of his rights and acquiesced in the transaction: *Gresley* v. *Mousley* (1858), 1 Giff. 450; see *Selsey* v. *Rhoades* (1827), 1 Bl. N. S. 1. The effect of acquiescence is increased where the property has passed through various hands, and the purchasers have laid out money upon it, and a title will be validated by time even though founded on breach of trust. Hence the Court has refused to set aside an improper sale by an executor where twenty years had elapsed since the youngest beneficiary came of age, the property having passed through many hands, and considerable sums having been laid out in improvements: *Bonney* v. *Ridgard* (1784), 1 Cox, 145. But a purchase by a trustee has been set aside after the lapse of ten years: *Hall* v. *Noyes* (1796), cited in *Whichcote* v. *Lawrence*, 3 Ves. Jun. p. 748; and a purchase by an agent, under circumstances of concealment, after eleven years: *Murphy* v. *O'Shea* (1845), 2 Jo. & Lat. 422.

Purchase of reversion.

In the case of a purchase of a reversion at an undervalue, or of an improper exercise by a mortgagee of his power of sale, there may be a claim to relief in equity, but in general it will not be entertained after a long delay. An unexplained delay of sixteen years (*Sibbering* v. *Earl of Balcarras* (1850), 3 De G. & Sm. 735), or twelve years (*Moth* v. *Atwood* (1801), 5 Ves. 845), has been held to bar a claim to set aside the sale of a reversion at an undervalue. In *Sibbering* v. *Earl of Balcarras* it was said that the Court was not bound to give relief in every case where, under analogous circumstances, the Statute of Limitations would not have applied at law. On the other hand, though a

Sale by mortgagee.

mortgagee is not a trustee for the mortgagor (*Farrar* v. *Farrars, Ltd.* (1888), 40 C. D. 409, C. A.; *Kennedy* v. *De Trafford*, [1897] A. C. 180), yet fifteen years has been held to be no bar to relief against an improper exercise by a mortgagee of his power of sale. "Even if it were a much longer time, it would be no bar to the right to redeem where relief is sought against the improper and oppressive exercise of a power of sale by the mortgagee": *per* Stuart, V.C., in *Robertson* v. *Norris* (1858), 1 Giff. 421; see *Pooley's Trustee* v. *Whetham* (1886), 33 C. D. 111, at p. 123, C. A.; *Martinson* v. *Clowes* (1882), 21 C. D. p. 860. But the statutory bar of twelve years on the right to redeem (*supra*, p. 89) would now give the limit to any such relief, and it is probable that in both these cases a shorter delay than formerly would operate as a bar.

(ii.) *Following Assets.*

Claims by mortgagees.

Upon the death of a mortgagor the mortgagee can enforce his security either against the mortgaged property, or, under the covenant, against the personal estate of the mortgagor; and if the personal estate has been distributed, he can, upon his real security proving deficient, follow the assets into the hands of the legatees. In *Leahy* v. *De Moleyns*, [1896] 1 I. R. 206, C. A., it was held that the right to follow assets was not lost by the lapse of over thirty years, the debt having been kept alive by payment of interest made by the owner of the mortgaged estate; but this is an extreme decision, and even if the mere lapse of time is not a bar, yet the fact of the mortgagee knowing of the distribution of the personal estate, and omitting for many years to make any claim against it, will usually indicate either acquiescence in this mode of dealing with it so as to bar the equitable claim to refunding: *Ridgway* v. *Newstead* (1861), 3 D. F. & J. 474; or a release of the personal estate from the mortgage debt: *Blake* v. *Gale* (1886), 32 C. D. p. 580, C. A. The mortgagee can also enforce his debt against other real estate of the mortgagor, provided it has not been aliened for value (*infra*, p. 371), but this is a legal claim, and is subject to different considerations. The claim subsists and is enforceable so long as the debt is duly kept alive: *Leahy* v. *De Moleyns* (*supra*); *Re Lacey*, [1907] 1 Ch. 330, C. A.

Refunding.

A claim to follow the assets of a trustee who has committed a breach of trust into the hands of his legatees is not barred

merely by length of time, but only where the lapse of time, with other circumstances, shows acquiescence: see *March* v. *Russell* (1837), 3 My. & Cr. 31; *Re Cross* (1882), 20 C. D. p. 124, C. A.; and though equitable claims to the refunding of assets improperly dealt with in the course of administration are liable to be barred by laches, yet the delay must be considerable. A claim by a beneficiary to recover trust funds from another who had been overpaid has been allowed after twelve years: *Harris* v. *Harris* (1861), 29 Beav. 110. And as to refunding by residuary legatees, see *Prowse* v. *Spurgin* (1868), 5 Eq. 99.

(iii.) *Partnership Interests.*

Partnership interests.

In *Clarke* v. *Hart* (1858), 6 H. L. C. 633, Lord Chelmsford, C., treated claims for the enforcement of existing partnership interests as being outside the doctrine of laches: *supra*, p. 259. In his view they were only liable to be barred when there had been such an abandonment or waiver of the right as would estop the plaintiff from enforcing it. In that case Hart was a partner in a mining venture, and in 1850 his share in the partnership had been declared by his co-partners to be forfeited. The forfeiture was ineffectual, and in 1853 Hart filed his bill for a dissolution of the partnership and an account. During the intervening three years he had refused to recognize the validity of the forfeiture, and hence, notwithstanding the speculative nature of the property, there was no abandonment of his right so as to make his claim unenforceable. But where the plaintiff receives notice of a forfeiture of his interest and does not object, the lapse of a comparatively short time—in *Prendergast* v. *Turton* (1841), 1 Y. & C. C. C. 98; on appeal, 13 L. J. Ch. 268, nine years; in *Rule* v. *Jewell* (1881), 18 C. D. 660, six years—will be held to prove abandonment. In *Rule* v. *Jewell*, Kay, J., adopted the period of six years as a bar in analogy to the statute, though the case was not one to which the analogy was applicable. In *Garden, etc., Mining Co.* v. *McLister* (1875), 1 App. Cas. 39, a delay of four years was not an abandonment. In *Palmer* v. *Moore*, [1900] A. C. 293, the delay was short, but the accompanying circumstances were held to show abandonment. The fact that these cases were decided on the ground of abandonment does not imply that, had the delay been more prolonged, the doctrine of laches would not have been applicable. Notwithstanding the suggestion to the contrary in Lord Chelmsford's

judgment in *Clarke* v. *Hart* (*vide supra*, p. 258), a claimant to an existing partnership interest will sue in vain if he has slept on his rights for many years. The question in these cases was whether, the delay not being long enough to amount to laches, the plaintiff had nevertheless deprived himself of his remedy by actual abandonment of his right; whether, in fact, he was barred by acquiescence in the strict sense: *supra*, p. 253.

(iv.) *Constructive Trusts.*

Constructive trusts

A claim to establish a constructive trust is one which calls for promptitude, and is liable to be barred on the ground of acquiescence, or by delay alone. "It is true that a trustee cannot set up [the Statute of Limitations] against his *cestui que trust*, but this is merely the case of a trustee by implication, and as such affected by an equity; but that equity must be pursued within some reasonable time": *Townshend* v. *Townshend* (1783), 1 Bro. C. C. 550, at p. 554. "It is certainly true," said Grant, M.R., in *Beckford* v. *Wade* (1805), 17 Ves. 87, at p. 97, "that no time bars a direct trust as between *cestui que trust* and trustee; but if it is meant to be asserted that a Court of Equity allows a man to make out a case of constructive trust at any distance of time after the facts and circumstances happened out of which it arises, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be; so far from it, that not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would originally have been given on the ground of constructive trust, it is refused to the party who after long acquiescence comes into a Court of Equity to seek that relief": *cf. Ex parte Hasell* (1839), 3 Y. & C. Ex. 617.

Constructive trust of speculative property.

And the time within which a constructive trust can be enforced depends also upon the nature of the property. In *Clegg* v. *Edmondson* (1857), 8 D. M. & G. 787, the managing partners of a mining partnership at will gave notice of dissolution to the rest, and intimated their intention to apply for a new lease for their own benefit. They obtained the lease and carried on business with success. The excluded partners continually claimed to be entitled to participate, but they took no active steps to enforce their claim for nine years. It was held that

the claim was then too late. "We have," said Turner, L.J. (at p. 807), "to consider the question of delay and acquiescence, and in determining the effect due to these considerations, we must take into account both the nature of the right which is claimed and of the property in which it is claimed. We have to deal in this case, not with a direct, but with a constructive trust, not with property subject merely to the ordinary contingencies by which all property is affected, and maintained at a moderate and scarcely varying expense, but with mining property which is subject to extraordinary contingencies, and which can be rendered productive only by a large and uncertain outlay. The authorities, I think, fully warrant us in saying that the rules which govern cases of direct trust, and apply to property of an ordinary character, do not equally apply to cases of constructive trust, and to property of the description which we have here to deal with": see *Senhouse* v. *Christian*, cited 19 Ves. p. 159; *Norway* v. *Rowe* (1812), 19 Ves. 144. But a trust as to shares in mines was established after fifteen years in *Turner* v. *Trelawney* (1841), 12 Sim. 49.

(v.) *Setting aside Gifts.*

Undue influence.

Promptitude is equally required when a plaintiff seeks to set aside a gift on the ground of undue influence. The length of time is regarded both as it affects the donor and the donee. As regards the donor it may show confirmation; as regards the donee, it may induce him to settle his mode of life upon the footing of the gift being effectual. No laches is attributable to the donor until he is sufficiently acquainted with his rights to enable him to assert them, and until he is free from the influence which invalidates the gift; see *per* Kekewich, J., in *Allcard* v. *Skinner* (1887), 36 C. D. p. 163. But when he is aware of his rights, and the undue influence has ceased, the Court expects to find steps immediately taken, if the gift is to be impugned, in order that the persons affected may know what line of conduct they are to adopt with regard to the transaction: *per* Lord Hatherley, C., in *Turner* v. *Collins* (1871), 7 Ch. 329.

Hence a gift by a daughter to a father has been validated in ten years, notwithstanding coverture: *Wright* v. *Vanderplank* (1856), 8 D. M. & G. 133; a gift of a reversion has been validated in seven years from the time when the donor became aware of his rights: *Turner* v. *Collins* (*supra*); and in *Allcard* v. *Skinner* (1887),

36 C. D. 145, C. A., the Court refused to set aside a gift to a religious sisterhood made in 1874 by a lady who left the sisterhood in 1879, but did not take proceedings till 1887. A donor who does not apply for relief promptly, but leaves the donee to think and to act upon the belief that the gift is to lie where it has been laid, is estopped by conduct; though Bowen, L.J., who enunciated this doctrine, based his actual decision upon the ground that the donor had elected not to disturb the gift. In *Hatch* v. *Hatch* (1804), 9 Ves. 292, a gift of an advowson by a ward to her guardian was set aside after twenty years, but the relationship of guardian and ward continued for four years after the gift, and for the rest of the time the donor was under coverture. Moreover, the decision, which was an extreme one, has been referred to fraud (*Turner* v. *Collins* (*supra*)), and to the peculiar nature of the property: *Byrne* v. *Frere* (1828), 2 Moll. 157.

(vi.) *Specific Performance and Rescission of Contracts.*

Specific performance.

The rule that applications for the peculiar relief afforded in equity must be made promptly is acted upon with special strictness in claims to specific performance or rescission of contracts. "Specific performance is relief which the Court will not give, unless in cases where the parties seeking it come promptly, and as soon as the nature of the case will admit": *per* Cranworth, L.C., in *Eads* v. *Williams* (1854), 4 D. M. & G. 674; see *Barclay* v. *Messenger* (1874), 43 L. J. Ch. p. 456. In the early cases a delay of seven years (*Milward* v. *Earl of Thanet* (1801), 5 Ves. p. 720 n.), or six years (*Harrington* v. *Wheeler* (1789), 4 Ves. 686), was too much, though a bill filed fourteen months after the termination of correspondence was in time: *Marquis of Hertford* v. *Boore* (1801), 5 Ves. 719. But now it is not safe to assume that any substantial delay will be allowed, and a vendor or purchaser who waits a year and a half (*Southcomb* v. *Bishop of Exeter* (1847), 6 Hare, 213), or a year (*Watson* v. *Reid* (1830), 1 R. & M. 236), will probably find his remedy gone. And a purchaser of a reversion cannot wait till the reversion falls in to enforce his contract: *Lery* v. *Stogdon* (1899), 1 Ch. 5, C. A.

Rescission of contract.

A family agreement for division of estates has been set aside after nineteen years where material information as to legitimacy had been withheld: *Gordon* v. *Gordon* (1821), 3 Swanst. 400.

But ordinary cases of rescission of contract are subject to the principle enunciated by Lord Selborne in *Lindsay Petroleum Co.* v. *Hurd* (1874), L. R. 5 P. C. p. 239 (*supra*, p. 257). The Court will consider the nature of the delay, and whether the defendant has been prejudiced, and will balance the convenience and inconvenience of granting relief. Under special circumstances a delay of two years has not been a bar to relief: *Foster* v. *Mutual Reserve Co.* (1904), 20 T. L. R. 715, H. L. And where the claim to rescission is based on misrepresentation, it has been said to be subject to the six years' limitation by analogy to an action for deceit: *Molloy* v. *Mutual Reserve Life Insurance Co.* (1906), 94 L. T. 756, C. A. But this is doubtful, and such cases appear to be within the rule calling for special promptitude, especially where the subject-matter of the contract is property of a speculative nature (*Seddon* v. *North-Eastern Salt Co.* (1904), 53 W. R. 232), or where third parties may be altering their position on the faith of the contract standing. This latter consideration is important in claims by a shareholder for rescission of a contract to take shares. He must rescind as soon as he learns the facts, or else he forfeits all claim to relief: *per* James, L.J., in *Sharpley* v. *Louth, etc., Ry. Co.* (1876), 2 C. D. p. 685, C. A.; and a delay of a month or even less may be fatal: *Taite's Case* (1867), 3 Eq. 795; *Re Scottish Petroleum Co.* (1883), 23 C. D. p. 434, C. A.; *Skelton's Case* (1893), 68 L. T. 210. The delay counts from the time when the shareholder can properly be fixed with notice of the facts upon which his claim to rescission is based: *Central Ry. Co. of Venezuela* v. *Kisch* (1867), L. R. 2 H. L. 99. An allotment of shares improperly made under the Companies Act, 1900 (63 & 64 Vict. c. 48), s. 4, can only be avoided within one month after the statutory meeting: sect. 5.

(vii.) *Claims against Directors.*

Dividends improperly paid.

In claims against directors for repayment of dividends paid out of capital special promptitude is required, and the lapse of a short time will bar the claim, especially if the dividends have been paid on the footing of balance sheets, drawn up in good faith and submitted to and approved by the shareholders: *Stringer's Case* (1869), 4 Ch. 475; *Re Mammoth Copperopolis of Utah* (1880), 50 L. J. Ch. 11. But where the shareholders have not approved the balance sheet and the

company is wound up, the liquidator is allowed a reasonable time for investigating the accounts before he makes the claim; and the time may be extended by a change of liquidators: *Re Alexandra Palace Co.* (1882), 21 C. D. 149.

As to claims against directors in respect of misstatements in a prospectus, and in respect of an irregular allotment of shares, *vide supra*, p. 241.

Section III.—Express Trusts.

(1) *Apart from the Trustee Act*, 1888, *s.* 8.

Claims against express trustees.

A claim by a *cestui que trust* against his trustee in respect of a breach of trust is now, with certain exceptions, subject to the bar of the Statute of Limitations by virtue of sect. 8 of the Trustee Act, 1888 (*infra*, 280); but otherwise any statutory limitations which might be applicable are excluded by the provision of sect. 25 (2) of the Judicature Act, 1873, and s. 28 (2) of the Judicature (Ireland) Act, 1877, that:—

Judicature Act, 1873, s. 25 (2).

> "No claim of a *cestui que trust* against his trustee for any property held upon an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations."

Time alone no bar.

It has been said that this is but a statutory declaration of a law which has been always recognized and administered in Courts of Equity: *Re Cross* (1882), 20 C. D. 109, C. A., at p. 121, *per* Baggallay, L.J. Taken in the literal sense, however, it is meaningless, for prior to 1888 there was no statutory limitation applicable as between trustee and *cestui que trust:* see *Re Bowden* (1890), 45 C. D. p. 451; and the effect of the enactment seems to be merely to confirm indirectly the rule that time alone cannot defeat a claim in equity in respect of a breach of an express trust (*Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, C. A., at p. 212), though it may be a bar to other equitable claims (*supra*, p. 261). A trust for sale in a will has been enforced notwithstanding the lapse of fifty years: *Mutlow* v. *Biggs* (1874), 18 Eq. 246.

Cestui que trust barred by laches.

But otherwise a claim of a *cestui que trust* against his trustee is subject to the general principles of equity as to delay. "Although," said Lord Westbury, C., in *M'Donnel* v. *White* (1865), 11 H. L. C. 570, p. 579, "it is perfectly true that no time runs as between the *cestui que trust* or the beneficiary and

the trustee upon an express trust, so as to bar the remedy of the beneficiary, yet with respect to claims made by him against a trustee, the general rule of equity that encouragement is not to be given to stale demands is equally applicable." The question, it was said by the Court of Appeal in *Re Cross* (*supra*), in a case where the trustee sets up delay as a defence, is "whether, having regard to the nature of the breach of trust, and the subsequent conduct of the parties interested in asserting any claim in respect thereof, there has not been such an amount of acquiescence and laches on the part of the parties interested as to make it inequitable that relief should be given to them; for the doctrine, that where there is an express trust delay in seeking relief in respect of a breach of it is not material, does not apply to a case in which there has been acquiescence or gross laches on the part of the *cestui que trust*." *Cf. Carey* v. *Cuthbert* (1873), Ir. R. 7 Eq. 542; (1875), Ir. R. 9 Eq. 330. "The books," said Romilly, M.R., in *Harcourt* v. *White* (1860), 28 Beav. 303, at p. 310, "abound with cases of gross breaches of trust, not complained of for a considerable number of years and not affected by the statute, where the Court has not interfered to afford any redress, at the instance of one who, knowing his right, has for many years forborne to enforce it."

Examples of laches.

Where during the life of a guardian, his ward, being unwilling to interrupt friendly relations, forbore to make a claim in respect of his neglect in recovering a debt, this was held to show acquiescence, and the claim was barred against the guardian's executors: *Sleeman* v. *Wilson* (1871), 25 L. T. 408. And as in other cases of laches, not only does acquiescence bar the claim, but the same effect is attributed to circumstances which have operated to the prejudice of the defendant, such as the destruction of evidence: *Bright* v. *Legerton* (1861), 2 D. F. & J. 606; or the expenditure of money on the property: *Bonney* v. *Ridgard* (1784), 1 Cox, 145; or the fact that the trustee has lost by the delay a right of indemnity which he could have enforced against a co-trustee: *Re Taylor* (1900), 81 L. T. 812. And see the cases cited above (p. 263) as to setting aside purchases by trustees.

Claims against strangers.

In general the rule excluding the statute applies only between the *cestui que trust* and the trustee. In favour of strangers, a bar to the trustee is a bar to the *cestui que trust* also: *Hovenden* v. *Annesley* (1806), 2 Sch. & Lef. 607, at p. 629;

Spickernell v. *Hotham* (1854) Kay, p. 675; *supra*, p. 79. Nor does it apply to claims in respect of constructive trusts: *Beckford* v. *Wade* (1805), 17 Ves. 87. These are liable to be barred by the statute, if applicable: *Banner* v. *Berridge* (1881), 18 C. D. 254; or, if no statute is applicable, they will only be entertained if made within a reasonable time: *Townshend* v. *Townshend* (1783), 1 Bro. C. C. 550 (*supra*, p. 268).

Constructive trusts.

Death of trustee.

The death of the trustee does not take the case out of the rule, and the statute does not run in favour of his estate against the claim of the *cestui que trust*: *Story* v. *Gape* (1856), 2 Jur. N. S. 706; *Obee* v. *Bishop* (1859), 1 D. F. & J. 137; *Brittlebank* v. *Goodwin* (1868), 5 Eq. 545; *Woodhouse* v. *Woodhouse* (1869), 8 Eq. 514; *British Mutual Investment Co.* v. *Smart* (1875), 10 Ch. 571, note; *Re Burge* (1887), 57 L. T. 364; *Re Blake* (1889), 60 L. T. 663. The Irish decisions, *Dunne* v. *Doran* (1844), 13 Ir. Eq. R. 545, and *Brereton* v. *Hutchinson* (1854), 3 Ir. Ch. R. 361, are overruled: *Smith* v. *Cork & Bandon Ry. Co.* (1870), Ir. R. 5 Eq. 65, p. 76, C. A.; *Carroll* v. *Hargrave* (1871), Ir. R. 5 Eq. 548, C. A.; see *Brittlebank* v. *Goodwin* (*supra*).

Persons treated as Express Trustees.

Persons treated as express trustees.

But though the exemption from the Statute of Limitations is confined to express trusts as opposed to trusts which are merely constructive, and the establishment of which may depend upon the sifting of conflicting evidence, yet the term "express trust" is not confined for this purpose to the ordinary case where there is an instrument in writing creating the trust, and where property is held by the trustee appointed under the instrument; and the following persons are treated as holding property upon an express trust; see *Soar* v. *Ashwell*, [1893] 2 Q. B. 390, C. A.:—

(i.) A trustee *de son tort*—that is, a person who assumes to act in an express trust as if he were duly appointed a trustee: *Life Association of Scotland* v. *Siddall* (1861), 3 D. F. & J. 58; *cf. Ex parte Gowers* (1837), 3 Mont. & A. 172. As to what constitutes a trustee *de son tort*, see *Re Barney*, [1892] 2 Ch. 265.

(ii.) A stranger to the trust who is privy to, and participates in, a fraudulent breach of trust by the trustee: *Barnes* v. *Addy* (1874), 9 Ch. 244.

(iii.) A stranger to the trust, who receives the trust moneys, knowing them to be such, and deals with them in a manner

inconsistent with the trust: *Lee* v. *Sankey* (1872), 15 Eq. 204. A beneficiary who has been overpaid his share of the trust fund is in the same position: *Harris* v. *Harris* (1861), 29 Beav. 110.

(iv.) One who stands in a fiduciary relation, and on the footing of such relation obtains possession of property: *Burdick* v. *Garrick* (1870), 5 Ch. 233; *M'Ardle* v. *Gaughran*, [1903] 1 I. R. 106; see *Re Bell* (1886), 34 C. D. 462; *Re Sharpe*, [1892] 1 Ch. p. 160, C. A.

Existing trust.

In the first three of these cases there is an express trust already affecting the property, and a person other than the trustee intervenes, or receives the property, so as to render himself liable as a trustee under that trust. The distinction between a person thus intervening, and one who is simply an agent of the trustees, and who does not make himself liable for their breach of trust, was pointed out by Lord Selborne, C., in *Barnes* v. *Addy* (1874), 9 Ch. 244. The responsibility of trustees may no doubt "be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust*. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers—transactions, perhaps, of which a Court of Equity may disapprove—unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest or fraudulent design upon the part of the trustees." Hence the solicitor of the trustees, who confines himself to doing such legal work as he is instructed to do, is not liable as an express trustee—or, indeed, as a constructive trustee—for any resulting breach of trust, unless it is part of a fraudulent design of which he has knowledge: *Mara* v. *Brown*, [1895] 2 Ch. 69; *Brinsden* v. *Williams* (1894), 38 Solicitors' Journal, 603.

Receipt of trust money by solicitor.

Where a solicitor or other agent of the trustees actually receives the trust money and fails to account for it, he is liable as an express trustee and cannot plead the statute: *Soar* v. *Ashwell*, [1893] 2 Q. B. 390, C. A.; *cf. Ex parte Gowers* (1837), 3 Mont. & A. 172. And a husband who receives property which, apart from the Married Women's Property Act, 1882, belongs to his wife for her separate use, receives it as a trustee for her: *Wassell* v. *Leggatt*, [1896] 1 Ch. 554; *cf. James* v. *Holmes* (1862),

31 L. J. Ch. 567, where a man received money for investment from a woman with whom he lived as his wife, and was held to be a trustee for her. Where money is standing to the account of trustees at a bank, and the bankers, with notice of the trust, transfer it at the direction of the tenant for life to his account and so obtain payment of his debt to themselves, the Statute of Limitations does not apply in a suit by the trustees to recover the trust fund: *Bridgman* v. *Gill* (1857), 24 Beav. 302.

Loan of trust money.

A person to whom trust money is lent, if the lending is a breach of trust and the borrower has notice of the trust, receives it as trustee, and cannot plead the statute: see *Ernest* v. *Croysdill* (1860), 2 D. F. & J. 175; *Re Dixon* (1900), 48 W. R. 665, C. A. And the result may be the same where the lending is authorized by the trust, as where money is lent to the husband under a power in a marriage settlement: *Coxwell* v. *Franklinski* (1864), 11 L. T. 153; *Jenner* v. *Akerman* (1864), 10 Jur. N. S. 465; especially where he engages to repay the trustees as such: *Spickernell* v. *Hotham* (1854), Kay, 669, pp. 675–677. But in general a loan of money by trustees does not impose the character of trustee on the borrower.

Covenant to settle money.

A covenant to settle money on trust does not ordinarily render the covenantor liable as a trustee: *Spickernell* v. *Hotham* (*supra*); *Stone* v. *Stone* (1869), 5 Ch. 74; yet such may under the circumstances be the effect: *Burrowes* v. *Gore* (1858), 6 H. L. C. 907, p. 941; and where the settlement recited that a sum of money had been paid to the trustee—this not being the fact—and the trustee covenanted to hold it upon trust and to invest it with the approbation of the settlor, it was held that the settlor had made himself a trustee: *Stone* v. *Stone* (*supra*).

Express trust arising from fiduciary position.

The fourth class mentioned above includes persons in a fiduciary position who receive property by virtue of that position; as a receiver or a trustee in bankruptcy: *Seagram* v. *Tuck* (1881), 18 C. D. 296; or the managers of a benevolent fund: *Edwards* v. *Warden* (1876), 1 App. Cas. 281; or a guardian of the property of an infant: *Mathew* v. *Brise* (1851), 14 Beav. 341. And it has been the rule in equity to exclude from the benefit of the statute all cases where an obligation to pay money has arisen out of the violation of confidence placed in a person holding a fiduciary position: *Teed* v. *Bere* (1859), 5 Jur. N. S. 381; see *Heath* v. *Henley* (1663), 1 Ch. Cas. 20; *Sheldon* v. *Weldman* (1663), 1 Ch. Cas. 26.

A trustee who is also a beneficiary, who purchases the trust property from a mortgagee, purchases for the trust estate, and cannot make a title in himself by the statute: *Duffy* v. *Duffy*, [1906] 1 I. R. 205, C. A. But where an administrator had already acquired a title to leaseholds of the intestate before he took out administration, he did not become a trustee, notwithstanding that he returned them among the assets: *Re M'Clure and Garrett's Contract*, [1899] 1 I. R. 225. And next of kin who enter upon leaseholds (*MacCormack* v. *Courtney*, [1895] 2 I. R. 97), or an executor *de son tort* (*Doyle* v. *Foley*, [1903] 2 I. R. 95), do not stand in a fiduciary relation to the administrator, so as to be unable to set up the statute. Neither an executor nor an executor *de son tort* is an express trustee: *Re Lacy*, [1899] 2 Ch. 149; *Doyle* v. *Foley supra*; (*supra*), p. 169. A contrary opinion was expressed in *Molony* v. *Molony*, [1894] 2 I. R. 1; *cf. Scott* v. *Knox* (1841), 4 Ir. Eq. R. 397.

Agent to receive and manage property.

An agent as such is not strictly in a fiduciary position for the above purpose, and, if he receives money simply for transmission to his principal, he is not an express trustee. If he receives it to hold on deposit, he probably is an express trustee, though in such a case the statute is also excluded on the ground that the right of action does not accrue till demand of the money: *Re Tidd*, [1893] 3 Ch. 154. And he is in a fiduciary position and ranks as express trustee, so far as regards the statute, if his duty requires him to receive property and manage it on behalf of his principal. In *Burdick* v. *Garrick* (1870), 5 Ch. 233, a person, who was resident in the United States, in 1858 gave a power of attorney to two persons in England, one of whom was a solicitor, authorizing them to sell his real and personal estate in England, and either to transmit the proceeds to him or to invest them in real or personal securities. Portions of the property were sold in 1858 and 1859, and a part of the proceeds was transmitted to the principal; but upon his death in 1859 the attorneys still retained in their hands a considerable sum for which they had not accounted. In 1867 the widow of the principal, who was also his administratrix, demanded an account, and the attorneys set up the statute.

Burdick v. *Garrick.*

To exclude the statute it might, perhaps, have been sufficient to rely upon the power of attorney as creating an express trust, but the Court of Appeal decided upon the broader ground, that

the attorneys had received money which it was their duty to deal with on behalf of their principal. The case, said Lord Hatherley, was that of an agent entrusted with funds, not for the purpose of remitting them when received to the principal, but for the purpose of employing them in a particular manner. This could not be distinguished from an ordinary fiduciary position which in equity creates a trust and excludes the defence of the statute. "I do not hesitate to say," said Giffard, L.J., "that where the duty of persons is to receive property and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over that property to somebody entitled to it": see *per* Lord Macnaghten, in *Lyell* v. *Kennedy* (1889), 14 App. Cas. p. 463; and as to this doctrine involving an extension of the proper definition of an express trust, see *per* Kay, J., in *Banner* v. *Berridge* (1881), 18 C. D. p. 264.

Solicitors and directors.

Hence a solicitor or other agent who receives property of his client or principal, and who is under a duty to invest or otherwise manage it, is in a fiduciary position and is, for the purposes of the statute, treated as an express trustee: *Gray* v. *Bateman* (1872), 21 W. R. 137. And if he has a general power of finding a suitable investment, he is liable as a trustee for any loss that may be caused by an improper selection: *Power* v. *Power* (1884), 13 L. R. Ir. 281. But if a solicitor receives money for the purpose of an investment selected or to be selected by the client, he is liable as a trustee only until the money has been applied to the selected investment: *Dooby* v. *Watson* (1888), 39 C. D. 178. A solicitor who receives his client's moneys simply for the purpose of transmitting them to the client is not in a fiduciary position in respect of such moneys and can plead the statute: *Re Hindmarsh* (1860), 1 Dr. & Sm. 129; *Watson* v. *Woodman* (1875), 20 Eq. 721, at p. 731. A director of a company is an agent with powers of management, and consequently is treated as an express trustee: *Flitcroft's Case* (1882), 21 C. D. 519, C. A.; but not an auditor: *Leeds Estate Co.* v. *Shepherd* (1887), 36 C. D. 787; or secretary: *Municipal Land Co.* v. *Pollington* (1890), 63 L. T. 238. And as to agents, *vide supra*, p. 243.

Summary jurisdiction over solicitors.

The Court has a summary jurisdiction over solicitors, as officers of the Court, in regard to moneys received by them on behalf of clients, and the exercise of such jurisdiction is not

necessarily excluded by the fact that the statute has run: *Ex parte Sharpe* (1837), 1 Jur. 405. But, in general, a solicitor can rely upon the statute to bar such a claim, just as in the case of a claim for negligence by him in his employment: *Re Triston* (1850), 1 L. M. & P. 74; and, after the statute has been successfully pleaded in an action, the client cannot have recourse to the summary jurisdiction of the Court: *Sittingbourne, etc., Ry. Co.* v. *Lawson*, W. N. (1886), p. 76.

Claim against separate estate.

It was at one time considered that where a creditor of a married woman had a right to payment out of her separate estate, this gave him the rights of a *cestui que trust* under the trust creating the separate estate, so that the statute would not run against his debt: *Norton* v. *Turvill* (1723), 2 P. Wms. 144; *Hodgson* v. *Williamson* (1880), 15 C. D. 87. But this notion has been exploded, and in such a case, if the creditor is a simple contract creditor, he is liable to be barred in six years in equity, in analogy to the legal bar: *Re Hastings* (1887), 35 C. D. 94, C. A.

Trusts for Creditors.

Trust to pay debts.

A trust in favour of creditors is not necessarily created upon a conveyance of property by the debtor in trust to pay debts, even though the names of the creditors are mentioned in a schedule to the deed. The arrangement is made by the debtor for his own personal convenience and accommodation—for the payment of his own debts in an order prescribed by himself—and the assignee is a trustee for the debtor: *Garrard* v. *Lauderdale* (1831), 2 R. & M. 451; *Synnot* v. *Simpson* (1854), 5 H. L. C. 121, *per* Lord Cranworth, C., at p. 133; *Johns* v. *James* (1878), 8 C. D. 744, C. A., *per* James, L.J., at p. 749; *Henriques* v. *Bensusan* (1872), 20 W. R. 350; *Re Sanders' Trusts* (1878), 47 L. J. Ch. 667.

Communication to creditors.

But the result is different where the execution of the conveyance is communicated to the creditors, and where there is evidence that they have been induced to place reliance upon it. The relation of trustee and *cestui que trusts* is then irrevocably established between the assignee and the creditors: *Acton* v. *Woodgate* (1833), 2 My. & K., 492; *Browne* v. *Cavendish* (1844), 1 Jo. & Lat. p. 635; *Harland* v. *Binks* (1850), 15 Q. B. 713. And a trust for creditors is established, too, when there are circumstances beyond the mere conveyance which show that

such was the intention of the debtor; as where, after the payment of debts, the surplus is given to persons other than the debtor: *Godfrey* v. *Poole* (1888), 13 App. Cas. 497; or where the trust is not to come into operation till the death of the debtor: *Synnot* v. *Simpson*, *supra*, *per* Lord Cranworth, C., at p. 139; *Re Fitzgerald's Settlement* (1887), 37 C. D. 18, C. A.—though possibly in this case the trusts are revocable during his life: see *Priestley* v. *Ellis*, [1897] 1 Ch. 489—or where the trusts are in favour of a particular class of creditors whom the debtor had special reasons for securing: *New's Trustee* v. *Hunting*, [1897] 2 Q. B. 19, C. A. (*c*) In these cases the object of the arrangement is bounty to the creditors, and not a mere mandate by the debtor to the assignee.

Similarly, a trust declared for creditors on the dissolution of a friendly society is enforceable by them: *Pare* v. *Clegg* (1861), 29 Beav. 589. In *Trevor* v. *Hutchins* (1897), 76 L. T. 636, C. A., a trust of partnership assets created by an inspectorship deed was held not to extend to the separate estate of each partner, notwithstanding that the surplus of such estates was to go to the partnership creditors.

(2) *The Trustee Act*, 1888, s. 8.

In general an express trustee can now, by virtue of the Trustee Act, 1888 (51 & 52 Vict. c. 59), plead the statute to a claim in respect of a breach of trust from which he has not derived personal benefit:—

Trustee Act, 1888, s. 8.

"(1) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof, still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—

"(*a*) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him:

"(*b*) If the action or other proceeding is brought to recover

(*c*) Affirmed, *sub. nom. Sharp* v. *Jackson*, [1899] A. C. 419, but the appeal did not touch this point.

money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so, nevertheless, that the statute shall run against a married woman entitled in possession for her separate use, whether with or without restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

"(2) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such an action or other proceeding and this section had been pleaded.

"(3) This section shall apply only to actions or other proceedings commenced after the 1st day of January, 1890, and shall not deprive any executor or administrator of any right of defence to which he is entitled under any existing statute of limitations."

The remainder of the Act, except sect. 1, has been repealed and re-enacted by the Trustee Act, 1893 (56 & 57 Vict. c. 53).

(i.) *Excepted Cases.*

Cases excepted from sect. 8.

The following cases are excepted from this relaxation of the law:—

(*a*) *Where the claim is founded on fraud.*—The trustee cannot plead the statute where the claim is founded upon any fraud or fraudulent breach of trust to which he was party or privy. The fraud must be actual fraud. "Fraud within the meaning of the Act must amount to dishonesty": *per* Fitzgibbon, L.J., in *Collings* v. *Wade*, [1896] 1 I. R. 340, C. A. Though in *Re Sale Hotel, etc., Ltd.*, 46 W. R. 314 (reversed in C. A. on another point, *ibid.*, 617), Wright, J., appears to have considered that constructive fraud was sufficient. The fraud of an agent will not be imputed to the trustee so as to make him "party or privy" to it, unless the agent committed it within the scope of his authority: *Thorne* v. *Heard*, [1895] A. C. 495. As to fraud by a partner, see *infra*, p. 298.

(*b*) *Where the property is still retained by the trustee.*—Property is not retained by the trustee unless it remains in his

hands or under his control. "The word 'still'," said Lindley, L.J., in *Thorne* v. *Heard*, [1894] 1 Ch. p. 606, "refers to the commencement of the action, and the use of the word is important. A trustee may be liable to make good trust money, with interest, as if it were still in his hands, and yet he may not in fact have it. But, in construing this statute, we have to ascertain whether in fact the trust property sought to be recovered is 'still retained' by the trustee. The question ought to be answered in the affirmative if he, or any agent for him, has it so that he can get it; but in the negative if it has been lost, whether by his negligence or otherwise": see *Collings* v. *Wade*, [1896] 1 I. R. 340; *Re Tufnell* (1902), 18 T. L. R. 705. Where a trustee receives money and mixes it with his own, it would seem that he still retains it, notwithstanding subsequent payments: see *Wassell* v. *Leggatt*, [1896] 1 Ch. 554. But there must be something morally wrong in the retention. Where he shares in a distribution of money as a beneficiary, this exception does not apply: *Re Timmis*, [1902] 1 Ch. 176.

(c) *Where property has been misappropriated by the trustee.* —To bring a trustee within this exception, the property must have been directly converted by him to his own use. An indirect conversion—as where the trustee happens to be a partner in a bank into which trust money improperly advanced is paid by the borrower: *Re Gurney*, [1893] 1 Ch. 590—is not enough. And a trustee who expends money in the maintenance of an infant beneficiary cannot be treated as converting it to his own use, notwithstanding that he does not account for it: *Re Page*, [1893] 1 Ch. 304.

(ii.) *Persons within the Statute.*

Persons entitled to the benefit of the section.

Save in the above cases a trustee can take the benefit of the Statute of Limitations by virtue of the provisions of sect. 8. By sect. 1 (3) of the Trustee Act, 1888, the expression "trustee" is defined to include "a trustee whose trust arises by construction or implication of law as well as an express trustee." But the definition is not material for the purpose of sect. 8, since only express trustees were formerly excluded from the benefit of the statute. All persons, however, who were formerly treated as express trustees, by reason of their being in a fiduciary position and receiving property in that capacity, are entitled to

the benefit of the section. Thus a director of a company, who is treated as an express trustee of money received by him, and who was formerly unable to plead the statute (*Flitcroft's Case*, 1882, 21 Ch. D. 519, C. A.), may now do so: *Re Lands Allotment Co.*, [1894] 1 Ch. 616, C. A.; *Whitwham* v. *Watkin* (1898), 78 L. T. 188; *Re National Bank of Wales*, [1899] 2 Ch. 699, C. A.; on appeal, *Dovey* v. *Cory*, [1901] A. C. 477, but not on this point. Sect. 8 does not extend, however, to a trustee in bankruptcy, or to a receiver or other person bound to account as an officer of the Court: *Re Cornish*, [1896] 1 Q. B. 99, C. A.

Persons claiming through trustee.

The provision of sect. 8 extends to "a trustee or any person claiming through him." The expression "claiming through" refers, "not to beneficiaries, but to persons deriving property from and becoming subject to the liabilities of the trustee; that is, generally speaking, his executors, administrators, or assigns": *Leahy* v. *De Moleyns*, [1896] 1 I. R. 206, C. A.; *per* Porter, M.R., p. 213; *per* Walker, C., p. 242. Hence residuary legatees, who have been paid by an executor and trustee while debts were outstanding, cannot set up the statute by virtue of sect. 8 against the claim of a creditor to follow assets into their hands: *Leahy* v. *De Moleyns*.

(iii.) *Operation of the Statute.*

Operation of sect. 8.

Sect. 8 contains two separate provisions regulating the mode in which the statute is to be applied to claims against trustees. They may be shortly expressed as follows: (*a*) In any action brought against a trustee, all rights and privileges conferred by the statute are to be enjoyed in the like manner as they would have been enjoyed in the action if the trustee had not been a trustee; and (*b*) if the action is brought to recover money or other property, and is one to which no existing Statute of Limitations applies, the trustee is to have the benefit of the statute as if the action were for money had and received. It has been objected to provision (*a*) that it is meaningless. "It is obvious," said Fry, L.J., in *Re Bowden* (1890), 45 C. D. 444, "that if a person had not been a trustee he could not be sued for a breach of trust; and further, there is no right or privilege that I am aware of conferred by any Statute of Limitations in respect of a breach of trust." In *How* v. *Earl of Winterton*, [1896] 2 Ch. 626, C. A., it was suggested by the Court of Appeal

that, even if the idea of trust were removed, yet there would be a breach of duty in respect of which an action would lie, and that possibly the sub-section would assist a trustee against whom an account was claimed. In *Robinson* v. *Harkin*, [1896] 2 Ch. 415, Stirling, J., intimated that it might cover a claim for contribution made by one trustee against another; but apparently the statute would run against such a claim apart from sect. 8.

Six years from breach of trust.

In general, however, claims against trustees in respect of breaches of trust are claims to recover money or other property, and are within clause (*b*), and it is upon this clause that the operation of the section seems to depend. The short effect of the section is that, save in the three excepted cases, a trustee who has committed a breach of trust is entitled to the protection of the several Statutes of Limitation as if actions for breaches of trust were enumerated in them: *per* Lindley, L.J., in *How* v. *Earl of Winterton* (*supra*). Where no existing statute applies, the trustee is entitled to plead the statute as if the claim had been made against him in an action of debt for money had and received. Hence, by virtue of the Limitation Act, 1623, it will be barred at the end of six years from the accrual of the cause of action; that is, from the commission of the breach of trust: *per* Lindley, L.J., in *Thorne* v. *Heard*, [1894] 1 Ch. p. 605. It is the breach, and not the consequent loss, which furnishes the cause of action: *Re Somerset*, [1894] 1 Ch. 231, C. A.; though in *Re Swain* (1891), 3 Ch. 233, Romer, J., used words intimating that the six years were to be reckoned from the time when the loss occurred.

Claims to account.

The same limit of six years applies to a claim to an account against a trustee. But this does not mean that the earlier accounts cannot be required for any purpose whatever. When a trustee is liable to make good moneys which have been in his hands, the action is maintainable in respect of the balance in his hands six years ago and the moneys received since, and what that balance was is a question with regard to which the earlier accounts are material. "It is," said Lindley, L.J., in *How* v. *Earl of Winterton*, [1896] 2 Ch. p. 640, "a mere question of fact to be ascertained by evidence, and in particular by the examination of the defendant on oath, and the production of his earlier accounts, which, of course, are evidence against him. But to take an account of his receipts and payments [back beyond the six years] is quite another matter. That involves

the disallowance of every payment which the defendant cannot now prove he is entitled to have allowed as against the plaintiff. Such an account is necessary to ascertain what the defendant ought to have had [at the beginning of the six years], but it is not necessary to ascertain what, in fact, he then had." In other words, accounts previous to the six years are only material as evidence of what the trustee actually had in hand at the date from which the account now to be taken is to run. The form of account directed in *How* v. *Earl of Winterton* is given in a note to *Re Davies*, [1898] 2 Ch. p. 144, where a similar account was ordered.

Claims to legacies.

Clause (*b*) applies only to cases to which no existing Statute of Limitations is applicable. A claim against executors to a legacy is subject to the limitation of sect. 8 of the R. P. L. A., 1874, and will consequently not be barred till the lapse of twelve years. But if the same persons are appointed executors and trustees of a will, and a legacy is left to them in trust, they will, upon appropriating money to answer the legacy, hold it as trustees and not as executors (*Phillipo* v. *Munnings* (1837), 2 My. & Cr. 309; *supra*, p. 172), and the limitation will be six years: *Re Swain*, [1891] 3 Ch. 233; *Re Timmis*, [1902] 1 Ch. 176.

Liability of partner for fraud of co-partner.

Where in an action for money entrusted to a firm of solicitors for investment, the statute is excluded on the ground of the concealed fraud of one of the partners, and the fraud is, by virtue of the partnership, imputable also to an innocent co-partner, the latter is not protected by the Trustee Act, 1888: *Moore* v. *Knight*, [1891] 1 Ch. 547; *infra*, p. 299.

Future beneficial interests.

It is expressly provided in clause (*b*) that where the statute runs by virtue of that clause, "it shall run against a married woman entitled in possession for her separate use, whether with or without a restraint on anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession." The effect is that in the ordinary case of trust funds being settled on trust for a tenant for life and then for persons in remainder, the statute will run in favour of the trustees from the date of the breach of trust as against the tenant for life, notwithstanding that such tenant for life may be a married woman restrained from anticipation; but, as against the remaindermen, only from the date when they become entitled in possession: *Re Taylor*

(1900), 81 L. T. 812. Consequently, if the tenant for life is barred, but the remaindermen are not, the case is met by ordering the trust funds to be replaced, but allowing the trustees to receive the income during the life tenancy: *Want* v. *Campain* (1893), 9 T. L. R. 254; *Re Somerset*, [1894] 1 Ch. 231, C. A.; *Collings* v. *Wade*, [1896] 1 I. R. 340. The payment of interest to the tenant for life on a fund improperly invested is not an acknowledgment of the trustees' liability in regard to the fund, so as to take the case out of the statute and save the rights of the tenant for life: *Re Somerset*. But a bar to the immediate life interest is not a bar also to any subsequent interest which the tenant for life may have, and, as regards such subsequent interest, the statute does not run until it falls into possession: *Mara* v. *Browne*, [1895] 2 Ch. 69. And as to suits by remaindermen on their interest falling into possession, see *Hawkins* v. *Gardiner* (1854), 2 Sm. & Giff. 441.

CHAPTER VI.

EXTENSION OF THE PERIOD OF LIMITATION.

When the statute has once begun to run against the right to bring an action, that right is in general barred by the lapse of the period applicable to the case; but such period may be extended by reason of disability in the plaintiff, and, in certain cases, by the absence abroad of the defendant; and a similar effect is produced in cases of concealed fraud by the rule that the right of action is not deemed to accrue till discovery of the fraud.

Section I.—Disability.

(1) *Land and Rent-charges.*

Extension of time for disability.

If at the time when the right to recover land or a rent-charge first accrues the claimant is an infant, or a married woman—but as to coverture, see *infra*, p. 289—or of unsound mind, he is not necessarily barred by the lapse of the statutory period of twelve years, or, in the case of a reversioner where the owner of the particular estate was out of possession, six years (R. P. L. A., 1874, s. 2), but a further period of six years is allowed from the time when the disability ceases, or, if death occurs during the disability, the same period from the death is allowed to the succeeding owner (R. P. L. A., 1874, s. 3). But for a claimant to have the benefit of this provision, the disability must exist when the right of action first accrues either to himself, or to some person through whom he claims. Thus, where a right of action to recover land accrued in 1871 to a tenant in tail not under disability, who died in 1882 without having commenced proceedings, and the issue in tail was then an infant, he was entitled to no allowance for disability. Time was already running against the claim, and his action, commenced in 1889,

was too late: *Murray* v. *Watkins* (1890), 62 L. T. 796; *Garner* v. *Wingrove*, [1905] 2 Ch. 233.

Rent-charge.

Since, in the case of a rent-charge, the statute runs, not from the date of failure to pay the rent-charge, but from the last receipt, a person who is of sound mind at the date of the last receipt, but is lunatic when the rent next falls due and is not paid, will have no allowance for his disability. His right of action is deemed to have accrued when he was still of sound mind: *Owen* v. *De Beauvoir* (1847), 16 M. & W. p. 567; 5 Ex. p. 182 (*supra*, p. 46).

Successive disabilities in same claimant.

But, provided some disability exists at the accrual of the right of action, the statute continues to be excluded during any further disability which may exist in the same claimant: *Borrows* v. *Ellison* (1871), L. R. 6 Ex. 128. The rule was the same before the R. P. L. A., 1833: *Lessee of Supple* v. *Raymond* (1830), Hayes, 6.

Maximum period.

There is, however, no allowance for a second disability in a successor in title to the person under disability when the right accrues: R. P. L. A., 1833, s. 18; and the entire period allowed in a case of disability may not exceed thirty years: R. P. L. A., 1874, s. 5.

The following are the sections in which these rules are contained:—

R. P. L. A., 1874, s. 3. In cases of infancy, coverture, or lunacy at the time when the right of action accrues, then six years to be allowed from the termination of the disability or previous death.

"If at the time at which the right of any person to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, (that is to say,) infancy, coverture, idiotcy, lunacy, or unsoundness of mind, then such person, or the person claiming through him, may, notwithstanding the period of twelve years, or six years, (as the case may be,) hereinbefore limited shall have expired, make an entry or distress, or bring an action or suit, to recover such land or rent, at any time within six years next after the time at which the person to whom such right shall first have accrued shall have ceased to be under any such disability, or shall have died (whichever of those two events shall have first happened)."

R. P. L. A., 1833, s. 18. No further time to be allowed for disability of successor.

"When any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent,

beyond the said period of *twelve* years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent, shall have first accrued, or the said period of *six* years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person."

The periods of twenty and ten years originally contained in this section were altered to *twelve* and *six* years by sect. 9 of the Act of 1874.

"No entry, distress, action, or suit shall be made or brought by any person who at the time at which his right to make any entry or distress, or to bring an action or suit to recover any land or rent, shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within thirty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such thirty years, or although the term of six years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired."

R. P. L. A., 1874, s. 5. Thirty years the utmost allowance for disabilities.

Under sect. 16 of the R. P. L. A., 1833, an extension of time was also allowed in the case of absence beyond seas; but this disability was abolished by sect. 4 of the Act of 1874:—

Abolition of absence beyond seas as a disability.

"The time within which any such entry may be made, or any such action or suit may be brought as aforesaid, shall not in any case after the commencement of this Act be extended or enlarged by reason of the absence beyond seas during all or any part of that time of the person having the right to make such entry, or to bring such action or suit, or of any person through whom he claims."

R. P. L. A., 1874, s. 4. No time to be allowed for absence beyond seas.

Since under the Married Women's Property Act, 1882, sect. 1 (2), a married woman is entitled to sue in her own name in respect of her separate property, it would seem that the disability of coverture is removed in cases where a married woman is entitled to land as her separate property. As to such property she is *discovert* for the purposes of the statute: *Weldon* v. *Neal* (1884), 51 L. T. 289; *Lowe* v. *Fox* (1885), 15 Q. B. D. 667, C. A., both decided on the Limitation Act, 1623; as to the right to sue as a *feme sole*: see *Weldon* v. *De Bathe* (1884), 14 Q. B. D. 339, C. A.; *Symonds* v. *Hallett* (1883), 24 C. D. 346, C. A.

Disability of coverture.

No allowance for disability in redemption action:

The extensions for disability do not apply to the case of a mortgagor bringing an action to redeem; the action is not one to recover land within sect. 1 of the R. P. L. A., 1874 (*Kinsman* v. *Rouse* (1881), 17 C. D. 104), but is the subject of separate limitation by sect. 28 of the R. P. L. A., 1833—now sect. 7 of the Act of 1874—and this section did not incorporate sect. 16: *Forster* v. *Patterson* (1881), 17 C. D. 132. And similarly sect. 40—now sect. 8 of the Act of 1874—limiting the time for the recovery of money charged on land (*De Beauvoir* v. *Owen* (1850), 5 Ex. p. 182), and sect. 42, limiting arrears of rent and interest (*Conolly* v. *Gorman*, [1898] 1 I. R. 20, p. 35), and sects. 30–33, limiting the time for enforcing a right of presentation, make no allowance for disability. But in an action for arrears of rent due under an indenture of demise, disability is allowed for by virtue of sect. 4 of the Civil Procedure Act, 1833 (*infra*, p. 291): *Nixon* v. *Darley* (1868), Ir. R. 2 C. L. 467, decided on the corresponding provision of the Irish C. L. P. A., 1853.

or money charged on land;

or arrears of rent and interest.

(2) *Simple Contract, Tort, and Specialty Debts.*

(i.) *Disability of Plaintiff.*

Simple contract and tort.

In actions founded on simple contract and tort, when the plaintiff is under disability at the time of the accrual of the action, the statutory period of six years runs from the cessation of the disability. The disabilities originally recognized were infancy, coverture, unsoundness of mind, imprisonment, and absence beyond seas. The rule is similar in the case of specialty debts, the statutory period of twenty years running from the cessation of the disability. The disabilities originally recognized were those just mentioned, with the exception of imprisonment. In the former actions the disability of imprisonment, and in both cases the disability of absence beyond seas has been expressly, and that of coverture indirectly, abolished. Thus, in all actions, the only disabilities now recognized, as regards plaintiffs, are infancy and unsoundness of mind.

Specialty debts.

Simple Contract and Tort.

The statutory provisions are as follows:—

Limitation Act, 1623, s. 7.

"Provided, nevertheless, that if any person or persons that is or shall be entitled to any such action of trespass, detinue, action

sur trover, replevin, actions of account, actions of debts, action of trespass for assault, menace, battery, wounding or imprisonment, actions upon the case for words, be or shall be at the time of any such cause of action given or accrued, fallen or come, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned or beyond the seas, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited after their coming to or being of full age, discovert, of sane memory, at large and returned from beyond the seas, as other persons having no such impediment should have done."

Infancy, coverture, lunacy, imprisonment, absence beyond seas.

Identical provision is made by 4 Anne, c. 16 (4 & 5 Anne, c. 3, in Rev. Stat.), s. 18, with respect to actions for seamen's wages.

Seamen's wages.

Sect. 7 of the Act of 1623 does not expressly mention "case," though it specifies two actions of the class, namely, *trover* and case for words. It is, however, construed so as to include all actions limited by the enacting section—sect. 3 (*supra*, p. 192)—and the allowance for disability extends to *assumpsit*, or its modern equivalent, both for a liquidated and unliquidated sum: *Piggot* v. *Rush* (1836), 4 A. & E. 912. In effect, it extends generally to actions founded on simple contract and tort.

Scope of sect. 7.

A plaintiff is not debarred by his disability from bringing the action during the continuance of the disability, and he may do so even though the statutory period has elapsed: *Piggott* v. *Rush* (1836), 4 A. & E. 912. If he dies while under disability, so that the statute has never commenced to run, it commences to run against his executor from the death, or against his administrator from the grant of letters of administration: *Fergusson* v. *Fyffe* (1841), 8 Cl. & F. 121, p. 140: *cf. Townsend* v. *Deacon* (1849), 3 Ex. 706.

Action during disability.

Death under disability.

Specialty Debts.

"If any person or persons that is or are or shall be entitled to any such action or suit, or to such *scire facias*, is or are or shall be, at the time of any such cause of action accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times after their coming to or being of full age, discovert, of sound memory, or returned from beyond the seas, as other persons having no such impediment should, according to the provisions of this Act, have done."

Civil Procedure Act, 1833, s. 4.

Infancy, coverture, lunacy, absence beyond seas.

Scope of the section.

The actions referred to are those mentioned in sect. 3 of the same statute with respect to which the limit is twenty years—namely, debt for rent on a lease under seal: *Nixon* v. *Darley* (1868), Ir. R. 2 C. L. 467; actions on a covenant or for a specialty debt, and debt or *scire facias* on a recognizance; and also the actions, omitted from the Act of 1623, with respect to which the limit is six years—namely, debt on an award, actions for copyhold fines, for an escape, and for money levied on a *fieri facias*.

Irish Statute.

C. L. P. (Ir.) Act, 1853, s. 22.

Corresponding provision is made in Ireland by the Common Law Procedure (Ireland) Act, 1853:—

> "If any person that is or shall be entitled to any such action is or shall be, at the time of any such cause of action accrued, within the age of twenty-one years, a married woman, of unsound mind, or beyond the seas, then such person shall be at liberty to bring the same action so as he commence the same within such time after the cessation of such disability, or his return from beyond the seas, as other persons having no such impediment should, according to the provisions of this Act, have done."

The actions referred to in this statute are both specialty actions and actions of simple contract and tort: *supra*, p. 198. The disabilities recognized were infancy, coverture, unsoundness of mind, and absence beyond seas.

Abolition of Certain Disabilities.

Imprisonment and absence beyond seas.

The disability of imprisonment where it existed, and also, as regards plaintiffs, the disability of absence beyond seas was abolished by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 10:—

Mercantile Law Amendment Act, 1856, s. 10.

Disability of absence beyond seas abolished under Limitation Act. 1623, 4 Anne, c. 16, Civ. Proc. Act, 1833, and

> "No person or persons who shall be entitled to any action or suit, with respect to which the period of limitation within which the same shall be brought is fixed by the Act of the twenty-first year of the reign of King James the First, chap. 16, sect. 3, or by the Act of the fourth year of the reign of Queen Anne, chap. 16, sect. 17, or by the Act of the fifty-third year of the reign of King George the Third, chap. 127, sect. 5 (*d*), or by the Acts of the third and fourth years of the reign of King William the Fourth, chap.

(*d*) The Ecclesiastical Courts Act, 1813. Sect. 5 is repealed "except as to tithes, offerings, and compositions, which have not been commuted or are otherwise still payable": Statute Law Revision Act, 1887 (50 & 51 Vict. c. 59).

27, sects. 40, 41, and 42 (*e*), and chap. 42, sect. 3, or by the Act of the sixteenth and seventeenth years of the reign of her present Majesty, chap. 113, sect. 20, shall be entitled to any time within which to commence and sue such action or suit beyond the period so fixed for the same by the enactments aforesaid, by reason only of such person, or some one or more of such persons, being at the time of such cause of action or suit accrued beyond the seas, or, in the cases in which by virtue of any of the aforesaid enactments imprisonment is now a disability, by reason of such person or some one or more of such persons being imprisoned at the time of such cause of action or suit accrued."

C. L. P. (Ir.) A., 1853. Disability of imprisonment abolished under Limitation Act. 1623, and 4 Anne, c. 16.

This enactment was retrospective, and hence it abolished the allowance on account of the absence of a plaintiff beyond seas in all cases, whether the cause of action accrued during absence before the statute or no: *Pardo* v. *Bingham* (1869), 4 Ch. 735. As long as absence beyond seas was recognized as a disability in a plaintiff, it applied as well to foreigners who had never been in this country as to British subjects residing abroad at the time of the accruing of the cause of action and afterwards returning to England: *Strithorst* v. *Graeme* (1771), 2 W. Bl. 723; *Lafond* v. *Ruddock* (1853), 13 C. B. 813; though a suit by a foreign creditor on a foreign judgment might be dismissed for delay: *Reimers* v. *Druce* (1857), 23 Beav. 145.

Sect. 10 was retrospective.

Foreign plaintiff.

Since, under sect. 1 (2) of the Married Women's Property Act, 1882, a married woman is capable of suing either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, she is *discovert* within the meaning of the above enactments, and the disability of coverture is therefore in effect abolished: *Weldon* v. *Neal* (1884), 51 L. T. 289; *Lowe* v. *Fox* (1885), 15 Q. B. D. 667, C. A.

Coverture.

(ii.) *Disability of Defendant.*

In the case of the absence beyond seas of a defendant at the time when the cause of action accrues, the plaintiff is assumed to be unable to sue, and the statute, as well in respect of simple contract and tort, as in respect of specialty debts, does not commence to run till the defendant is in this country:—

Absence beyond seas.

"And . . . if any person or persons against whom there is or shall be any such cause of suit or action for seamen's wages, or against whom there shall be any cause of action of trespass,

1 Anne, c. 16, s. 19.

(*e*) These sections were included in error. They make no allowance for disability: *supra*, p. 290.

Simple contract and tort.

detinue, actions *sur trover* or replevin, for taking away goods or cattle, or of action of account or upon the case, or of debt grounded upon any lending or contract without specialty, of debt for arrearages of rent, or assault, menace, battery, wounding, and imprisonment, or any of them, be or shall be at the time of any such cause of suit or action given or accrued, fallen or come, beyond the seas, that then such person or persons who is or shall be entitled to any such suit or action shall be at liberty to bring the said actions against such person or persons after their return from beyond the seas, within such times as are respectively limited for the bringing of the said actions before by this Act and by the said other Act made in the one-and-twentieth year of the reign of King James the First.

Civil Procedure Act, 1833, s. 4.

Specialty debts.

"If any person or persons against whom there shall be any such cause of action is or are, or shall be at the time such cause of action accrued, beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such times as are before limited after the return of such person or persons from beyond the seas."

For Ireland, both as to simple contract debts and tort, and specialty debts:—

C. L. P. (Ir.) Act, 1853, s. 22. Specialty debts and simple contract debts and tort.

"If any person or persons against whom there shall be any such cause of action is or shall be at the time such cause of action accrued beyond the seas, then the person entitled to any such cause of action shall be at liberty to bring the same against such person, within such time as is before limited, after the return of such person from beyond the seas."

"Beyond seas."

With respect to the expression "beyond seas," it is provided as follows:—

Civil Procedure Act, 1833, s. 7: Mercantile Law Amendment Act, 1856, s. 12.

"No part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of His Majesty, shall be deemed to be beyond seas, within the meaning of [4 Anne, c. 16, the Civil Procedure Act, 1833, or the Mercantile Law Amendment Act, 1856].

A corresponding definition with reference to sect. 22 of the C. L. P. (Ir.) A., 1853, is contained in s. 4 of that statute.

Effect of absence beyond seas.

The effect of these enactments is that, as to all actions in respect of which a limitation is imposed by the Limitation Act, 1623, the statute 4 Anne, c. 16, or the Civil Procedure Act, 1833, or the corresponding Irish enactment, if the defendant is

abroad at the time when the cause of action accrues, the operation of the statute is suspended, and the period does not commence to run until he is in this country. But any casual visit by the defendant to this country will put an end to the disability, although the plaintiff is not aware of it: *Gregory* v. *Hurrill* (1826), 5 B. & C. 341.

Action accruing abroad.

And although the cause of action accrues in a foreign country where both parties are resident, and the action is barred under the law of that country before the defendant leaves it, yet the plaintiff can sue in this country within six (or twenty) years of the defendant's return: *Williams* v. *Jones* (1811), 13 East, 439. If, however, the effect of the Statute of Limitations of the foreign country is to extinguish the debt, and not merely to bar the remedy, the plaintiff cannot sue in this country after such extinction, at any rate if both parties have resided in the foreign country during the whole period of limitation: *Huber* v. *Steiner* (1835), 2 Bing. N. C. 202, at p. 211; Foote's Priv. Int. Jur., 3rd ed. p. 520.

Action not prevented by absence beyond seas.

Where the defendant is abroad, the plaintiff is not debarred from suing, and he may sue even though the statutory period has already elapsed if the defendant is still abroad. The effect of the statutes is simply to extend the time for suing till six (or twenty) years after the defendant's return (*Forbes* v. *Smith* (1855), 11 Ex. 161), and this result is not altered by the facilities which now exist for serving a writ out of the jurisdiction under R. S. C. 1883, Ord. 11, r. 1: *Musurus Bey* v. *Gadban*, [1894] 2 Q. B. 352, C. A.

Defendant dying abroad.

Where a debtor resides and dies abroad, the statute does not run in favour of his executor in this country till he takes out probate (*Douglas* v. *Forrest* (1828), 4 Bing. 686), or intermeddles: *supra*, p. 206. If the executor also is abroad, the statute does not run till he comes to this country and proves the will or intermeddles here: *Flood* v. *Patterson* (1861), 29 Beav. 295.

Joint debtors.

The case of absence beyond seas of one of several joint debtors is provided for as follows:—

Mercantile Law Amendment Act, s. 11.

"Where such cause of action or suit, with respect to which the period of limitation is fixed by the enactments aforesaid or any of them (*f*), lies against two or more joint debtors, the

(*f*) *I.e.* the enactments referred to in s. 10: *supra*, p. 292; The Limitation Act, 1623; 4 Anne, c. 16; Civil Procedure Act, 1833; C. L. P. (Ir.) A., 1853.

Period of limitation to run as to joint-debtors in the kingdom.

person or persons who shall be entitled to the same shall not be entitled to any time within which to commence and sue any such action and suit against any one or more of such joint debtors who shall not be beyond the seas at the time such cause of action or suit accrued, by reason only that some other one or more of such joint debtors was or were at the time of such cause of action accrued beyond the seas, and such person or persons so entitled as aforesaid shall not be debarred from commencing and suing any action or suit against the joint debtor or joint debtors who was or were beyond the seas at the time the cause of action or suit accrued, after his or their return from beyond the seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not or were not beyond seas at the time aforesaid."

Statute excluded only as against joint debtors who are abroad.

The effect of this enactment is that where there are two or more joint debtors, whether in simple contract or by specialty, the statute runs forthwith in favour of such as are within the seas; but it does not run in favour of such as are abroad until their return, and an action will lie against them on their return, notwithstanding that judgment has been already recovered against the other joint debtors. In general, recovery of judgment against one of several persons jointly liable is a bar to an action against the rest: *King* v. *Hoare* (1844), 13 M. & W. 494; *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504. Previously to this enactment the fact of one joint debtor being abroad saved the statute as against all, until his return or death: *Fannin* v. *Anderson* (1845), 7 Q. B. 811; *Towns* v. *Mead* (1856), 16 C. B. 123.

Section II.—Fraud.

Effect of fraud.

The effect of fraud in postponing the operation of the statute depends, as to claims to land and rent-charges, on sect. 26 of the R. P. L. A., 1833; and as to other claims, upon the general rule of equity that time is no bar in cases of fraud until the fraud is, or might with ordinary diligence have been, discovered. Since the statutory provision is founded on this general rule, it will be convenient to consider the latter first.

(1) *Claims in Equity.*

(*a*) *Where no Statute applicable.*

Time alone no bar in cases of fraud.

In equity time is no bar in cases of fraud so long as the fraud is unknown to the plaintiff and he is in no way to blame for his want of knowledge. Under such circumstances neither acquiescence nor laches can be imputed to him. Delay, it was said in *Alden* v. *Gregory* (1764), 2 Eden, 280, will never purge a fraud. And since acquiescence is a question of fact, it was, under the former procedure, held that the bar of time in equity could not be set up on demurrer: *Earl of Deloraine* v. *Brown* (1792), 3 Bro. C. C. 633; *cf. Foster* v. *Hodgson* (1819), 19 Ves. 180. In *Charter* v. *Trevelyan* (1844), 11 Cl. & F. 714, a conveyance fraudulently obtained in 1788 was set aside upon a bill filed in 1827, the fraud not having been discovered till 1825. In *Roche* v. *O'Brien* (1810), 1 Ball & B. 330, a deed was set aside after thirty-four years where the party had remained in ignorance of his rights. (*g*)

Time runs when fraud might be discovered.

But in cases of fraud, as in other cases, "it is the duty of the Court, when transactions of long standing are brought before it, most anxiously to weigh all the circumstances of the case, and to consider what evidence there may have been which from lapse of time may have been lost": *Charter* v. *Trevelyan* (1844), 11 Cl. & F. p. 740. (*h*) And consequently the date from which laches is reckoned is not the actual discovery of the fraud, but the time when, if he had used due diligence, the plaintiff would have discovered it. "The fraud is considered to be discovered at the time when such reasonable notice of what has happened has been given to the person injured as to make it his duty, if he intend to seek redress, to make inquiry and to ascertain the circumstances of the case": *Marquis of Clanricarde* v. *Henning* (1861), 30 Beav. 175, *per* Romilly, M.R., at p. 180. "When," said Lord Westbury, C., in *Rolfe* v. *Gregory* (1864), 4 D. J. & S. p. 579, "the remedy is given on the ground of fraud, it is governed by this important principle, that the right of the party defrauded is not affected by lapse of time, or, generally speaking, by anything done or omitted to be done, so long as he remains,

(*g*) See *Johnston* v. *Howison* (1850), 13 Ir. Eq. R. 163.
(*h*) See *Whalley* v. *Whalley* (1821), 3 Bligh, 1.

without any fault of his own, in ignorance of the fraud that has been committed." But he ceases to be thus blameless, and ceases, therefore, to be entitled to the benefit of the rule, when he omits inquiries which, under the circumstances, should be made. Where one party is entitled to rely on the fidelity of another—as in the case of partners—he is not bound to inquire as to the conduct of the other until he has reason for suspicion: *Rawlins* v. *Wickham* (1858), 3 De G. & J. 304; *Betjemann* v. *Betjemann*, [1895] 2 Ch. 474, C. A.

Twenty years the maximum limit if fraud discovered within that time.

When once the fraud has been discovered it is the duty of the plaintiff to claim relief promptly, and he is not entitled to any definite period, such as twenty years, from the date when it was, or should have been, discovered. On the other hand, this period will be in practice a bar to the claim if, during its currency, he has become aware of the facts: see *Earl of Deloraine* v. *Brown* (1792), 3 Bro. C. C. 633; *Medlicott* v. *O'Donel* (1809), 1 Ball & B. 156. "Length of time of more than twenty years bars even in case of fraud if the party to be barred has become in any reasonable period cognizant of the facts. For, if there is the full period of twenty years, it is immaterial that during much of that time he had no notice of the fraud": *per* Hart, L.C., *Byrne* v. *Frere* (1828), 2 Moll. 157. But there might be circumstances of acquiescence and of prejudice to the defendant, arising after the discovery of the fraud, which would bar the remedy within the twenty years.

Stated account.

A stated account of long standing, as of twenty-three years (*Vernon* v. *Vawdrey* (1740), 2 Atk. 119), or seventeen years (*Allfrey* v. *Allfrey* (1849), 1 Mac. & G. 87), will be reopened on the ground of fraud recently discovered; but special directions will be inserted for the protection of the accounting party (*Allfrey* v. *Allfrey*); and, even in a case of gross fraud, an account ought not to be decreed after a considerable length of time against executors, legatees, and innocent persons claiming under the fraudulent party: *Hercy* v. *Dinwoody* (1793), 2 Ves. Jun. 87, *per* Arden, M.R., at p. 92.

Fraud of partner.

An innocent member of a firm is not liable for the fraud of a partner committed on his own account, and not in the ordinary course of business: *Hughes* v. *Twisden* (1886), 55 L. J. Ch. 481. But it is otherwise where the fraud has been committed in the course of business. Thus where moneys duly paid to a firm for investment have been fraudulently represented by one of the

partners as invested, these representations bind the innocent co-partner, and the statute does not run in his favour till the fraud is discovered, even though the partnership has been in the meantime dissolved: *Blair* v. *Bromley* (1847), 2 Phil. 354. And since this result depends on the principles of the law of partnership, and not of trusts, the innocent partner cannot claim the protection of sect. 8 of the Trustee Act, 1888: *Moore* v. *Knight*, [1891] 1 Ch. 547. In these cases the fraud and its concealment, though committed by one partner, are imputable to the firm, and the cause of action does not accrue until the fraud is discovered: *Thorne* v. *Heard*, [1894] 1 Ch. 599, C. A., *per* Lindley, L.J.

(*b*) *Where Statute applicable by Analogy.*

Statute runs from discovery of fraud.

The effect of fraud is the same in cases where the equitable claim is subject to a statutory bar by way of analogy, except that, since the bar depends not on laches, but upon the statute, the plaintiff is entitled to the statutory period from the date of the discovery of the fraud. If, for example, an agent or other person in a fiduciary position makes a secret profit out of his position, the principal or *cestui que trust* can recover the amount of the profit as an equitable debt; but the statutory period of six years will not begin to run until the facts as to the profit have been discovered: *Metropolitan Bank* v. *Heiron* (1880), 5 Ex. D. 319, C. A.; *cf. Lister & Co.* v. *Stubbs* (1890), 45 C. D. 1, C. A. In the case of a secret profit made by a director or promoter of a company, notice to the board of directors will not constitute notice to the company, so as to make the statute run, unless the board is independent of the person whose conduct is impugned: *Re Fitzroy, etc., Steel Co.* (1884), 50 L. T. 144.

An equitable action based on misrepresentation is barred in six years by analogy to a common law action of deceit, but the period does not commence to run until the plaintiff knew, or with ordinary intelligence ought to have known, the facts which establish the misrepresentation. But it then runs, although the plaintiff does not draw the correct legal inferences. When these facts include the correct construction of a document, which is the subject of litigation, the period runs from the date when the question of construction is first decided by a competent Court, not from the confirmation of the decision by a Court of

Appeal: *Molloy* v. *Mutual Reserve Life Insurance Co.* (1906), 94 L. T. 756, C. A.

Underground trespass.

Fraud which will exclude the statute is frequently referred to as "concealed fraud." "It has always been a principle of equity that no length of time is a bar to relief in the case of fraud, in the absence of laches on the part of the person defrauded. There is, therefore, no room for the application of the statute in the case of concealed fraud, so long as the party defrauded remains in ignorance without any fault of his own": *per* Lord James of Hereford, in Privy Council, in *Bulli Coal Mining Co.* v. *Osborne*, [1899] A. C. 351, at p. 363. This, however, does not imply that there must be active concealment. It is no more than an assertion that the fraud, which in its nature is secret, is also undiscovered. Thus in cases of fraudulent taking of minerals by underground trespass, it is not necessary, as was suggested in *Dean* v. *Thwaite* (1855), 21 Beav. 621, and held in *Re Astley, etc., Coal Co. and Tyldesley Coal Co.* (1899), 80 L. T. 116, that steps should have been taken to conceal the fact. And although the mere breaking of bounds into a neighbour's colliery is not to be regarded as fraudulent for the purpose of the statute—as was suggested by Malins, V.C., in *Ecclesiastical Commissioners* v. *N. E. Ry. Co.* (1877), 4 C. D. 845—yet the fact that the taking of coal is in pursuance of a wilful trespass, and is secret, makes the taking fraudulent, and an account will be directed of the whole coal taken and will not be limited to six years: *Bulli Coal Mining Co.* v. *Osborne*, [1899] A. C. 351. In cases of inadvertent trespass the account is limited to six years: *Llynri Co.* v. *Brogden* (1870), 11 Eq. 188; *Hilton* v. *Woods* (1867), 4 Eq. 432; *Trotter* v. *Maclean* (1879), 13 C. D. 574; *Dawes* v. *Bagnall* (1875), 23 W. R. 690.

Where no action lies at date of discovery.

If for any reason an action does not lie at the time when the fraud is discovered, then the statute does not commence to run until an action could be brought. Thus if the fraud is discovered during the bankruptcy of the party injured, since he cannot then bring an action, the statute does not run till the end of the bankruptcy: *Re Crosley* (1887), 35 C. D. 266, C. A.

(2) *Simple Contract, Tort, and Specialty Debts.*

At common law no allowance for fraud.

In regard to actions which are liable to be barred under the Limitation Act, 1623, and the Civil Procedure Act, 1833, there

is no provision for any extension of time on the ground of fraud, and, prior to the Judicature Acts, courts of law refused to allow that a replication of concealed fraud could get rid of a defence of the statute: *Imperial Gas Co.* v. *London Gas Co.* (1854), 10 Ex. 39. The terms of the statute, it was said, were absolute, and there was no provision for the case where a person was prevented from suing by fraud: *Hunter* v. *Gibbons* (1856), 1 H. & N. 459. If, however, a suit for a similar matter was brought in equity, then, as just stated, the Court of Chancery, in applying the statutory limit by way of analogy, applied it on its own terms—namely, that the statute should not be set up unjustly—and it declined, therefore, to allow the statute to operate until the fraud was, or might have been, discovered: *Booth* v. *Warrington* (1714), 4 Bro. P. C. 163; *South Sea Co.* v. *Wymondsell* (1732), 3 P. Wms. 143; *Horenden* v. *Annesley* (1806), 2 Sch. & Lef. p. 634. Since the Judicature Acts such a claim, even though brought in the King's Bench Division, is entitled to rank for this purpose as a suit in equity, and hence it is subject to the equitable rule as to the postponement of the operation of the statute in case of fraud: *Gibbs* v. *Guild* (1882), 9 Q. B. D. 59, C. A.

Equitable rule now prevails.

It has been suggested that in such cases the active concealment of the original cause of action furnishes a continuing cause of action, and that only on this ground can the statute be postponed: *Barber* v. *Houston* (1885), 18 L. R. Ir. 475, C. A. But this was not the ground of the decision in *Gibbs* v. *Guild*. Provided that there would, prior to the Judicature Acts, have been concurrent remedies at common law and in equity, then the action, wherever brought, is now subject to the equitable doctrine. Active concealment of the fraud is not required. If the fraud is secret, then the statutory period is postponed to the time when it was, or with due diligence might have been, discovered; and the six years or other period then begins to run. On the other hand, if there is no fraud, a defendant is not deprived of the benefit of the statute because the plaintiff was not aware, during the statutory period, that he had a cause of action. Hence, in an action for negligence against a solicitor, the concealment of the negligence till within six years is no answer, if the defendant was not guilty of fraud: *Armstrong* v. *Milburn* (1886), 54 L. T. 723, C. A.

(3) *Land and Rent-charges.*

As to land and rent-charges a rule, corresponding to the rule of equity, is expressly enacted by sect. 26 of the R. P. L. A., 1833 :—

R. P. L. A., 1833, s. 26. Concealed fraud.

> "In every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or, with reasonable diligence, might have been first known or discovered; provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed."

Scope of sect. 26.

The section only applies in cases of "concealed fraud," a term which is more strictly construed than the fraud which is the subject of the rule of equity, and in other respects its scope is limited by its terms. Thus to gain the benefit of the section, a plaintiff must make out, "first, that there has been concealed fraud; secondly, that he and his predecessors in title have been deprived of the land by such fraud; and, thirdly, that the fraud has not been discovered, and could not with reasonable diligence have been discovered," within twelve years of action brought : *per* Lindley, L.J., in *Willis* v. *Earl Howe*, [1893] 2 Ch. p. 549, C. A.; *Lawrence* v. *Lord Norreys* (1890), 15 App. Cas. p. 214.

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(i.) *Concealed Fraud.*

Concealed fraud.

By concealed fraud, said Kindersley, V.C., in *Petre* v. *Petre* (1852), 1 Drew. p. 397, is not meant "the case of a party entering wrongfully into possession; it means a case of designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment enables himself to enter and hold : see *per* Kay, L.J., in *Willis* v. *Earl Howe* (*supra*).

In *Vane* v. *Vane* (1872), 8 Ch. 383, the bill alleged that by the secret alteration of a register an eldest child who was really illegitimate, was made to appear legitimate, and the eldest legitimate son in consequence was kept out of his inheritance. James, L.J., said: "It is difficult to conceive what would be a concealed fraud, if what is alleged here is not, namely, that a person is induced, by a deception practised on him from his earliest knowledge, to believe that he was only a younger son when he was the eldest son, or how a person could be more effectually deprived by fraud of his estate than by his being designedly, by the persistent falsehood and deceit of those about him, kept in ignorance of his birthright, and so prevented from claiming it." In *Chetham* v. *Hoare* (1870), 9 Eq. 571, also, the alleged fraud consisted in the tampering with a register; in *Lawrence* v. *Lord Norreys* (1890), 15 App. Cas. 210, it was the destruction of a tombstone; in *Willis* v. *Earl Howe*, [1893] 2 Ch. 545, C. A., it was the putting forward of an illegitimate child as the lawful heir. *Vane* v. *Vane.*

In *Sturgis* v. *Morse* (1854), 24 Beav. 541, an insolvent debtor had, in 1825, fraudulently omitted from his schedule reversionary property to which he was entitled, and which fell into possession the following year. In 1853 his assignee filed a bill to recover it from the assignee under a subsequent bankruptcy. Romilly, M.R., held that there was a concealed fraud, and that the statute had not run. "I am of opinion," he said, "that, there being at the time nothing to point out to the assignee that [the insolvent debtor] had any other property than that stated in the schedule, the fact of his deliberately stating in the schedule that which was false, namely, that he had no reversion, was a 'concealed fraud,' and that, by reason of such fraud, the assignee in insolvency was prevented from acquiring this property, or, in the words of the statute, was 'deprived' of the property." In general, however, the mere withholding of information which ought to be communicated to the party entitled is not a concealed fraud within the meaning of the statute: *per* Lord Chelmsford, in *Archbold* v. *Scully* (1861), 9 H. L. C. p. 384. *Sturgis* v. *Morse.*

In *Lewis* v. *Thomas* (1843), 3 Hare, 26, it was suggested by Wigram, V.C., that the procuring instruments of devise and conveyance to be executed by a person of unsound mind was a concealed fraud under sect. 26. But lunacy is protected by the Procuring conveyance from lunatic.

saving for disability: *Manby* v. *Bewicke* (1857), 3 K. & J. 342; though there may be cases in which the lunacy of one of the parties is a material element in determining whether the person entitled has been deprived of his land by a concealed fraud: *cf.* *Price* v. *Berrington* (1851), 3 Mac. & G. 486.

Possession of mines.

The effect of fraud as regards claims to an account of minerals secretly taken has already been considered. In an action for the recovery of the mines themselves the concealed fraud which will save the statute is similar to that in the case of a claim to surface land. There must be an intentional trespass by the wrongdoer, and steps taken to prevent discovery by the owner. Mere ignorance of the trespass on the part of the owner does not prevent the running of the statute: see *Dawkins* v. *Penrhyn* (1877), 6 C. D. p. 324, C. A. The suggestion to the contrary in *Adnam* v. *Earl of Sandwich* (1877), 2 Q. B. D. p. 489, appears to be incorrect: *supra*, p. 47. Nor does such ignorance make the intrusion fraudulent. There must, as was said by Fry, J., in *Rains* v. *Burton* (1880), 14 C. D. p. 540, be fraud and concealment of fraud, and in that case concealed fraud was not proved by the fact of possession having been taken of an underground cellar, there being no evidence of an attempt to conceal the possession from the owner. Apart, however, from any question of concealed fraud, the statute will not run against the owner of the mines, unless adverse possession has been effectively taken, and in this respect it may be important to inquire whether the owner was cognizant that acts of trespass were being committed: *Earl of Dartmouth* v. *Spittle* (1871), 19 W. R. 444 (*supra*, p. 44).

Fraud must be by defendant.

The concealed fraud, moreover, must be the fraud of the person who sets up the statute, or of some person through whom he claims. In *McCallum* v. *McCallum*, [1901] 1 Ch. 143, C. A., A., in September, 1884, by voluntary deed, conveyed the house in which he and his wife and daughter were residing to his wife in fee. Later in the same month the wife by voluntary deed conveyed the house to the daughter, who was the plaintiff in the action, but she concealed the deed from the daughter, intending that it should only be communicated to her in certain events. A., who did not know of the wife's conveyance, continued to reside with his wife in the house till her death in 1888, and subsequently he lived in it, or received the rents, till his own death in 1899. He devised all the residue of his property to

the defendant, his niece, who, in answer to the daughter's claim, set up the statute. The daughter attempted to exclude the statute on the ground of her mother's concealed fraud, but it was held by the Court of Appeal (Lord Alverstone, C.J. and Vaughan Williams, L.J., Rigby, L.J., *diss.*) that, since the defendant did not claim through the mother, sect. 26 did not apply.

(ii.) *Deprivation by the Fraud.*

Owner must be "deprived" by the fraud.

In addition to making out a case of concealed fraud, the plaintiff who relies on sect. 26 must show that he or his predecessor in title has been actually deprived of the land by the fraud.

Lawrance v. *Lord Norreys*.

In *Lawrance* v. *Lord Norreys* (1890), 15 App. Cas. 210, an action was brought to recover possession of the Towneley estate in Lancashire. Richard Towneley, a former owner of the estate, died in 1706. It was alleged that Mary, his daughter, married John Lawrance, and died in America in 1742. She became heiress to Richard Towneley, and Jonathan Lawrance, a descendant of hers, returned to England and recovered possession of the estate under a compromise with one John Towneley. Jonathan Lawrance was said to have remained in possession till his death in 1816. His son and heir, Lebius Lawrance, was then in America, and the alleged fraud was as follows:—When the solicitors of Jonathan Lawrance were about to communicate to Lebius Lawrance the facts of his title, John Towneley, who had taken possession of the estate, intervened, and induced them not to do so. He further obtained from them, and destroyed, the evidence of Jonathan Lawrance's title, including the deed of compromise. And, lastly, he procured to be taken up and destroyed the tombstone erected over the grave at Walpole, in Massachusetts, of Mary Towneley, afterwards Mary Lawrance, and her husband, on which certain material particulars establishing the identity of Mary Towneley, and certain material particulars of her family were inscribed, Lebius Lawrance being ignorant of the facts inscribed on the tombstone. The plaintiff claimed through Lebius Lawrance as heir-at-law of Jonathan Lawrance.

As to the failure of the solicitors to communicate with Lebius Lawrance, it was held that this only shut up one avenue by which Lebius Lawrance could have ascertained his rights; and,

assuming, as might properly be done on the pleadings, that he was aware of his father's journey to England, and the object of it, other means of ascertaining them were available; while, as to the destruction of the tombstone, it did not appear that Lebius Lawrance or his successors in title knew of its existence, or would have done so but for its destruction. Consequently by neither of these circumstances could they be said to have been deprived of the property. As to the other allegations there was nothing to show that with due diligence they could not have been discovered earlier.

Willis v. *Earl Howe.*

Where there is at first a mere wrongful entry, so that the statute commences to run against the person entitled, and subsequently possession is taken or kept by means of a fraud, this does not bring the case within sect. 26. The owner is deprived of the land by the wrongful entry, not by the fraud. In *Willis* v. *Earl Howe*, [1893] 2 Ch. 545, William Jennens, who was in possession of real estate, died intestate in 1798. It was alleged that Lady Sophia Curzon, afterwards Baroness Howe, wrongfully took possession on behalf of her infant son, George Curzon, claiming that he was heir-at-law, and that on his death in infancy in 1805, she continued to hold possession on behalf of Richard Curzon, falsely pretending that he was the younger brother of George, when, in fact, he was the illegitimate child of one Ann Oakes. This was said to have been fraudulently concealed from the predecessors in title of the plaintiff who claimed as heir-at-law of William Jennens. It was held that what really deprived the plaintiff's predecessors of the land was the wrongful entry in 1798, as to which there was no fraud and no concealment. Consequently the subsequent alleged fraud was immaterial.

(iii.) *Failure to discover the Fraud.*

Reasonable diligence.

To support a claim founded on concealed fraud it must further be shown that the alleged time of discovery was the earliest at which with reasonable diligence discovery could have been made. This is a point which it is for the claimant to prove, and, for the safety of persons in possession of property, the Court insists on its being proved strictly. In other words, it will assume, whenever possible, that the fraud might have been discovered earlier.

Chetham v. *Hoare*.

In *Chetham* v. *Hoare* (1870), 9 Eq. 571, the action was to recover estates which had been in the possession of the defendants and their predecessors in title for 149 years. The title of the plaintiff depended on proof of a marriage between Timothy Chetham and Hannah Ashton, and it was alleged that repeated search for evidence of this had formerly been made. The plaintiff, upon the death of his father in 1863, renewed the search, and during a visit to the diocesan registry at Chester he discovered by mere chance an index of marriages which showed that the one in question had been celebrated at Holy Trinity, Salford, in 1724. There were indications that the page containing this entry had at one time been gummed or pasted to the opposite page. The plaintiff went to Holy Trinity and found that the whole of the page of the register, upon which the entry should have been inscribed, had been torn out. Assuming that these allegations could have been proved, there would seem to have been a case of concealed fraud, but the bill was demurred to, and Malins, V.C., allowed the demurrer. He commented upon the danger of upsetting a title founded on such a length of possession, and refused to believe that for more than a century after the marriage took place no diligence could have found other means of proving it. The section was applied with equal strictness in *Re Jennens*, *Willis* v. *Earl Howe* (1880), 50 L. J. Ch. 4.

A trustee in bankruptcy, who sets up a case of concealed fraud, shows no lack of due diligence by omitting to make inquiries which might have led to the discovery of the fraud, but which he was under no obligation to make: *Sturgis* v. *Morse* (1857), 24 Beav. 541 (*supra*, p. 303).

In considering whether due diligence has been shown no allowance will be made in respect of the mental incapacity of the claimant. He gains no advantage from the fact that he is too imbecile to detect a fraud which would have been discovered by a person of ordinary mental capacity: *Manby* v. *Bewicke* (1857), 3 K. & J. 342.

CHAPTER VII.

STOPPING THE STATUTE.

Modes of stopping the statute.

The running of the statute may be stopped in the case of land by re-entry, and in all cases by the commencement of an action to enforce the claim of the person entitled. It may also be stopped by acknowledgment or part payment. The nature of re-entry has been already stated: *supra*, p. 11.

Section I.—Commencement of Action.

(1) *Issue and Renewal of Writ.*

Issue of writ.

The various Statutes of Limitation provide that no proceedings shall be brought to enforce the claim which is the subject of limitation after the prescribed period. Hence the running of the statute is stopped by the commencement of proceedings—that is, in ordinary cases, by the issue of a writ in an action. But it is essential that the writ shall be issued before the statute has run, and, if the plaintiff has by inadvertence allowed the statutory period to expire, he cannot cure his error by having the writ ante-dated. By R. S. C., 1883, Ord. 2, r. 8, it is required that a writ shall bear date on the day on which it is issued—that is, on the day on which it is sealed—and the Court has no power to alter the date of the writ so as to save the statute: see *Clarke* v. *Smith* (1858), 2 H. & N. 753, decided on the corresponding provision of sect. 5 of the C. L. P. A., 1852.

Amendment to exclude statute not allowed.

The issue of the writ, however, is not conclusive of the final scope of the action. Changes may be required which enlarge the claim or alter the parties. But although in both respects the Court has a general power of allowing amendments, yet this will not be exercised so as to deprive a defendant of the benefit of the statute. "Amendments are not admissible when they prejudice the rights of the opposite party as existing at the date

of such amendments": *per* Lord Esher, M.R., in *Weldon* v. *Neal* (1887), 19 Q. B. D. 394, C. A. Consequently an amendment cannot be made so as to introduce a fresh cause of action which has become barred since the date of the writ: *Weldon* v. *Neal*; *Hudson* v. *Fernyhough* (1890), 61 L. T. 722; *on app.* 34 Sol. Journ. 228; *Lancaster* v. *Moss* (1899), 15 T. L. R. 476, C. A. And the defendant cannot amend if the effect is to show that a third party, in whose favour the statute has run, is liable: *Steward* v. *North Metropolitan Tramways Co.* (1886), 16 Q. B. D. 556, C. A.

Striking out parties.

Formerly an error as to parties led to a non-suit. This meant that a fresh action had to be commenced, and, if the statute had run in the interval, the plaintiff would be barred. But the Court was averse to allowing an action to be nullified after the statute had run through irregularity of procedure: *Markey* v. *Dowdell* (1852), 2 Ir. C. L. R. 117; and where the error consisted in the joinder of improper parties, the non-suit might be set aside and the parties struck out by amendment: *Crawford* v. *Cocks* (1851), 20 L. J. Ex. 169. Non-suit is now abolished, and no cause is defeated by reason of the misjoinder or non-joinder of parties. Under Ord. 16, r. 11, parties may be struck out or joined, and consequently any error as to parties can be cured without prejudice to the currency of the action. Thus the fact that the statutory period has run since the issue of the writ presents no difficulty when it is desired to strike out parties.

Joinder of new defendant not allowed after statute has run.

But it is otherwise where it is desired to add a defendant in whose favour the statute has run since the issue of the writ. A mere substitution of a real for a nominal defendant—as of a company for its officer (*Coombs* v. *Bristol and Exeter Ry. Co.*, 1858, 1 F. & F. 206)—would be permitted; and in *Challinor* v. *Roder* (1885), 1 T. L. R. 527, a Divisional Court (Denman, J., Grove, J., *diss.*) dismissed an appeal against an Order in Chambers substituting the real name—John Myatt—of one of three defendant executors, for the name, John Hill, which had been mentioned in the writ. This was upon the ground that it was only just to the other two that Myatt should be joined, and that since power to join him existed under Ord. 16, r. 11, it ought to be exercised. But, in general, a writ cannot be amended by adding a defendant against whom the Statute of Limitations has run: see *Byron* v. *Cooper* (1847), 11 Cl. & F.

556; though an error in the Christian name of a defendant may be corrected: see *Ryan* v. *Sheehy* (1848), 12 Ir. L. R. 44.

Renewal of writ.

A writ issued, but not served, may be kept in force for the purpose of saving the statute by renewal. Under the C. L. P. A., 1852 (15 & 16 Vict. c. 76), s. 11, no restriction was placed on successive renewals. The original writ was in force for only six months, but if any defendant had not been served, the writ might at any time before its expiration be renewed for six months from the date of renewal, and so on from time to time during the currency of any renewed writ. The renewal was effected by having the writ resealed, and it was expressly provided that a writ so renewed should remain in force and be available for preventing the operation of the Statute of Limitations. But resealing required the production of the original writ. If this was lost, the Court would not allow the resealing of a verified copy so as to save the statute: *Davies* v. *Garland* (1876), 1 Q. B. D. 250. The corresponding provision in Ireland—sect. 28 of the C. L. P. (Ir.) A., 1853 (16 & 17 Vict. c. 113)—contained a proviso that the renewed writ should not be available to prevent the operation of the statute unless the renewal was "had by leave of the Court or a judge on an affidavit to satisfy the said Court or a judge that reasonable diligence was used to effect service thereof."

Present practice as to renewal.

Renewal of writs is now regulated in England by R. S. C., 1883, Ord. 8, r. 1, and in Ireland by R. S. C. (Ir.) 1891, Ord. 8, r. 1, and these rules follow the lines of the Irish statute just quoted. The original writ remains current for twelve months, but, if any defendant has not been served, the plaintiff may, before the expiration of the twelve months, apply to the Court or a judge for leave to renew the writ; and "the Court or a judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal inclusive, and so on from time to time during the currency of the renewed writ."

The direction that the six months shall be inclusive of the day of renewal is an adoption of the construction given to sect. 1 of the C. L. P. A., 1852: *Anon.* (1863), 1 H. & C. 664; *cf.* *Anon.* (1854), 24 L. J. Q. B. 23. The writ is renewed by a fresh sealing, and the rule provides, like that section, that the renewed

writ shall remain in force and be available to prevent the operation of the Statute of Limitations from the date of the issuing of the original writ of summons. Provision for the case of a lost writ is made by Ord. 8, r. 3, and a copy may be sealed on renewal. Thus the plaintiff has no longer the right of renewal. The renewal can only be effected by leave—and this was held to be so although the original writ was issued before the Judicature Act, 1873 (*Hume* v. *Somerton* (1890), 25 Q. B. D. 239)—and, in order to obtain leave, the plaintiff must come within twelve months of the currency of the original writ, or six months of the currency of a renewed writ.

Failure to renew in time.

Under the old practice the plaintiff was bound to come for renewal strictly within the prescribed time. It he did this and failed to obtain renewal through the default of an officer of the Court, he was entitled to indulgence: *Nazer* v. *Wade* (1861), 1 B. & S. 728; 31 L. J. Q. B. 5; *Anon.* (1862), 31 L. J. Q. B. 61. But he got no indulgence if he came to renew on the last day and found the office properly shut: *Evans* v. *Jones* (1862), 2 B. & S. 45. If the last day was a Sunday, he was bound to renew on the Saturday: *Anon.* (1854), 24 L. J. Q. B. 23; and if for one or more of the last days the office was closed for holidays, he was bound to come on the last day before the expiration of the six months on which the office was open: *Anon.* (1862), 31 L. J. Q. B. 61. And though the failure to renew in time was due to the inadvertence of the plaintiff's solicitor, the Court would not order a resealing of the writ *nunc pro tunc*, so as to save the statute: *Bailey* v. *Owen* (1860), 9 W. R. 128; *Nazer* v. *Wade* (*supra*); *Anon.* (1862), 31 L. J. Q. B. 61.

No enlargement of time to save statute.

The Court or a judge now has power under Ord. 64, r. 7, to enlarge any time appointed by the rules, even though the application for the enlargement is not made till after the expiration of the appointed time. But this power will not be exercised so as to enable a plaintiff against whom the statute has run to proceed with his action: *Doyle* v. *Kaufman* (1877), 3 Q. B. D. 7, 340, C. A.; *Magee* v. *Hastings* (1891), 28 L. R. Ir. 288. And in *Hewett* v. *Barr*, [1891] 1 Q. B. 98, where the omission to apply for renewal in time was accidental, the Court of Appeal followed *Doyle* v. *Kaufman*, though Kay, L.J., thought that under exceptional circumstances the Court might exercise its jurisdiction to enlarge the time. It is safer to assume, however, that inadvertence is not a ground for indulgence, and that the only

ground on which the plaintiff can excuse his failure to apply for renewal in time would be that he had been prevented by the default of an officer of the Court.

Several defendants.

Where there are several defendants, and renewal has been allowed on an affidavit of inability to serve one, this saves the statute as to all, although the others could have been served and were not: *Dickson* v. *Capes* (1860), 11 Ir. C. L. R. 334.

Concurrent writ.

Where an original writ has been duly kept in force, and it is found necessary to issue a concurrent writ for service out of the jurisdiction, this may be allowed, notwithstanding that the statute has then run: *Smalpage* v. *Tonge* (1886), 17 Q. B. D. 644, C. A.

How far statute saved.

The writ only saves the statute for the purpose of the particular action which it originates. Its pendency does not enable a fresh action for the same subject-matter to be commenced in another division of the High Court after the statute has run: *Manby* v. *Manby* (1876), 3 C. D. 101. And any renewals must be in strict accordance with the rules: *Pratt* v. *Hawkins* (1846), 15 M. & W. 399, at p. 403.

Revivor of suit.

When one of several plaintiffs dies before the trial, and judgment is given for the defendant, an order of revivor will not in general be made under R. S. C. Ord. 17, r. 4, in favour of his personal representatives, though possibly this would be done if the bringing of a fresh action had become impossible by reason of the statute: *Arnison* v. *Smith* (1889), 40 C. D. 567, at p. 570, C. A. But it may well become necessary to revive an administration action, and the right to do so after decree is not barred by lapse of time, though revivor may be denied in cases of gross negligence or laches: *Alsop* v. *Bell* (1857), 24 Beav. 451; *Re Johnson* (1885), 29 C. D. 964, at p. 970; *Micklethwaite* v. *Vavasour* (1893), 37 Sol. Journ. 386.

(2) *Administration and Incumbrancers' Actions.*

Administration action.

It was formerly the rule that the filing of a bill for administration saved the statute as to all creditors whose claims were not then barred. This was based both upon the nature of the suit, and upon the nature of the jurisdiction in equity. The suit, being brought on behalf of the plaintiff and all other creditors, was the suit of all; moreover, the Court, not being bound by the statute, would not follow the analogy of the statute so as to

make it necessary for each creditor to file a separate bill: *Sterndale* v. *Hankinson* (1827), 1 Sim. 393. The latter reason, as was pointed out in *Berrington* v. *Evans* (1835), 1 Y. & C. Ex. 434, was removed as to judgment creditors by sect. 40 of the R. P. L. A., 1833, which placed an express limitation of twenty years upon suits in equity, as well as actions at law, to recover judgment debts. And it was there held that a judgment creditor, who had not been cognizant of the bringing of the suit, could not take advantage of it after the lapse of many years, though possibly it would be available for a creditor who knew of the filing of the bill and intended to prosecute his claim in the suit. The cases of *St. John* v. *Boughton* (1838), 9 Sim. 219, and *Watson* v. *Birch* (1847), 15 Sim. 523, on the other hand, suggested that nothing but an actual claim by a creditor would stop the statute running against him. In the former case, however, the debts in question had been kept alive by acknowledgment, and in the latter the suit was not on behalf of creditors generally.

Sterndale v. *Hankinson*.

In Ireland the case of *Sterndale* v. *Hankinson* was treated with more favour than here. It was admitted, indeed, in accordance with *Berrington* v. *Evans* (*supra*), that a creditor's suit could not be treated as the suit of a creditor who was unaware of it until it was too late for him to make his claim in the ordinary course: *O'Kelly* v. *Bodkin* (1841), 3 Ir. Eq. R. 390; *Hutchins* v. *O'Sullivan* (1847), 11 Ir. Eq. R. 443. But a suit, whether expressed to be on behalf of all creditors or not, which resulted in an administration decree, was treated as the suit of all creditors who came in under the decree, as well where it was commenced before the R. P. L. A., 1833 (*O'Kelly* v. *Bodkin* (1840), 2 Ir. Eq. R. 36), as where it was commenced after: *Carroll* v. *Darcy* (1847), 10 Ir. Eq. R. 321. And in *Bermingham* v. *Burke* (1845), 2 Jo. & Lat. 699, at p. 714, Lord St. Leonards—then Sugden, L.C.—was strongly of opinion that a creditor, not barred at the commencement of the suit, could claim in the suit, provided he came in according to the decree and course of the Court. "Perhaps, therefore," he said (Real Prop. Stat., p. 126), "we may be justified in considering *Sterndale* v. *Hankinson* as still law in both countries, although the rule is to be cautiously applied since the new Act. The suit must in effect be the suit of the creditor, one under which he would have a clear right to prosecute his demand, and of which he was fully aware, and his demand must be such as would not have been

Sterndale v. *Hankinson* followed in Ireland.

barred if he had himself filed the bill actually before the Court; and, irrespective of the statute, he would be bound, in order to avail himself of the suit, to conform to the general orders of the Court, and not to be guilty of gross laches." But this assumed that the action was one which the creditor could himself have brought. A mortgagee's suit for foreclosure or sale did not prevent the statute running against a judgment creditor of the mortgagor, since such creditor could not have instituted the suit: *Bennett* v. *Bernard* (1849), 12 Ir. Eq. R. 229.

Sterndale v. *Hankinson* overruled in England.

For England, however, the rule in *Sterndale* v. *Hankinson* was abolished by *Re Greares* (1881), 18 C. D. 551, where Jessel, M.R., pointed out that the reasons upon which the rule was based had ceased to exist. The Act of 1833 had already imposed an express limitation in equity on judgment debts, and the effect of the Judicature Acts, he held, was to make the statute of James binding upon each division of the High Court as regards simple contract debts. Hence the Chancery Division was bound to apply the six years' limitation to such debts. Moreover, as regards actions for administration of personal estate, the action was not expressed to be on behalf of all creditors, nor under the present practice were there any considerations of expense which required that it should be treated as the action of all the creditors.

In actions for the administration of real estate, it is still necessary for the plaintiff to sue on behalf of himself and all other creditors: *Re Tottenham*, [1896] 1 Ch. 628; and hence to such actions the whole of this reasoning does not apply. But this is not sufficient ground for excluding them from the decision in *Re Greares;* and the present rule is, that the commencement of an administration action, whether for administration of personal estate or of real and personal estate, saves the statute only as regards the actual plaintiff: *cf. Thompson* v. *Hurley*, [1905] 1 I. R. 588.

Administration judgment stops statute.

As soon, however, as a judgment is pronounced to the benefit of which the creditors generally are entitled, the statute ceases to run against those whose debts are not then barred. Every one who has a subsisting claim at the time of the administration judgment is entitled to participate in the assets: *Re General Rolling Stock Co.* (1872), 7 Ch. p. 650 (*infra*, p. 319). In *St. John* v. *Boughton* (1838), 9 Sim. 219, Shadwell, V.C., appears to have considered that the statute would run against each creditor until he

made his claim. But in *Re Greares* (*supra*), Jessel, M.R., intimated that the judgment would prevent the further running of the statute as against creditors who came in under it; and, in addition to the dictum from *Re General Rolling Stock Co.* just referred to, this was expressly laid down by Bacon, V.C., in *Finch* v. *Finch* (1876), 45 L. J. Ch. 816, where a decree for administration had been made in a legatee's action. "That decree," he said, "directs an inquiry as to what the debts of the testator were, and the subsequent part of the decree ordered them to be paid. That decree, then, operates as a judgment in favour of such creditors as could substantiate their claims to the extent of preventing the time limited by the statute from running against the recovery of such debts": see *Re Crosley* (1887), 35 C. D. 266, p. 270; *Re Ebbs' Estate* (1893), 31 L. R. Ir. 95.

And where there has been a judgment for administration, it stops the statute, notwithstanding that a creditor, who has proved under the judgment, has to take an independent step, such as a petition for a sale, in order to obtain payment of his debt: *Re Ebbs' Estate* (*supra*). It is assumed that the creditor duly comes in under the judgment; otherwise he cannot rely upon it as stopping the statute in his favour: *Berrington* v. *Evans* (1835), 1 Y. & C. Ex. 434; *Tatam* v. *Williams* (1844), 3 Hare, 347. Moreover, the administration judgment operates from its date, not merely in favour of creditors, but in favour also of the estate—that is, of the personal representatives, and of other creditors if the estate is insolvent—as regards a claim of set-off against a creditor's demand, and it stops the running of the statute against this claim: *Re Ballard*, W. N. (1890), p. 64. The judgment does not preserve a specific lien on the estate, such as a vendor's lien, though the person entitled to the lien could ordinarily prove as a personal creditor: *Toft* v. *Stephenson* (1848), 7 Hare, 1.

Where judgment is not in favour of creditors generally.

But if a judgment is not such that creditors generally can take advantage of it, the statute is not saved as to them, and it continues to run against each creditor until he commences some proceeding to enforce his claim: *Watson* v. *Birch* (1847), 15 Sim. 523. If such a claim is duly made in the action it stops the statute, although it may be necessary to take some further proceeding to enforce it: *Greenway* v. *Bromfield* (1851), 9 Hare, 201; see *Congreve* v. *Power* (1828), 1 Moll. 121. Similarly, where in a mortgagee's suit there is, after the mortgagee has

been paid, a surplus available for other claimants, the statute runs against such claimants until they make their claims, or until a judgment is given to the benefit of which they are entitled: *Archdall* v. *Anderson* (1890), 25 L. R. Ir. 433; *cf.* *Bennett* v. *Bernard* (1849), 12 Ir. Eq. R. 229.

Where creditor is party to action.

And the statute continues to run against a creditor notwithstanding that he is a defendant to the suit (*Watson* v. *Birch* (*supra*)), though the contrary is suggested by *Humble* v. *Humble* (1857), 24 Beav. 535, at p. 540. Hence a defendant who has a claim against the estate which is the subject of the suit should take steps to enforce it either by counterclaim in the suit, or by issue of a writ, if there is any chance of the statutory period expiring before an order is made to the benefit of which he would be entitled.

Heir claiming adversely.

The commencement of a suit for the administration of the estate of a testator does not save the statute from running against the heir who claims adversely to the trusts of the will; but if, in the events that happen, part of the estate is undisposed of, and is held by the trustees in trust for him, as to this he is not barred: *Simmons* v. *Rudall* (1850), 1 Sim. N. S. 115.

Arrears of interest.

It has been held in Ireland that when a claim made in a suit carries interest, the arrears are to be allowed for six years prior to the commencement of the suit; whether the statute is checked as regards the particular claim by a general administration order (*Re Ebbs' Estate* (1893), 31 L. R. Ir. 95), or, where there is no such order, by the bringing in of the claim: *Archdall* v. *Anderson* (1890), 25 L. R. Ir. 433. But this practice is founded on *Sterndale* v. *Hankinson* (1827), 1 Sim. 393, which is not now an authority in England (*supra*), and in this country, if an order for general administration has been made, the six years should be reckoned prior to the order, since this stops the running of the statute; while, if there is no such order, the six years are reckoned prior to the making of the claim: *Hunter* v. *Nockolds* (1850), 1 Mac. & G. 640; *Greenway* v. *Bromfield* (1851), 9 Hare, 201; *cf.* *Henry* v. *Smith* (1842), 2 Dr. & War. 381; *Montgomery* v. *Southwell* (1843), 2 Con. & Law. 263. *In Chappel* v. *Rees* (1852), 1 D. M. & G. 393, interest was reckoned prior to the commencement of the suit; but this cannot now be regarded as an authority.

Claims arising in course of suit.

The pendency of a suit prevents the statute running against claims arising in the course of the suit. Thus where in the

course of an administration suit debts of the testator are paid out of the income of a beneficiary, under such circumstances that the beneficiary is entitled to be recouped out of *corpus*, the pendency of the suit prevents the statute from running against the claim to recoupment: *Alsop* v. *Bell* (1857), 24 Beav. 451.

Where there is no suit pending, but a creditor sends in a claim in answer to the executors' advertisement, this does not stop the statute: *Re Stephens* (1889), 43 C. D. 39. Claim not in suit.

(3) *Order for Sale.*

An order for sale of land in Ireland, made in the Landed Estates Court, is considered to be made on behalf of every person interested in the proceeds of sale, and it stops the running of the statute as regards incumbrancers who are not then barred: *Re Colclough* (1858), 8 Ir. Ch. R. 330. It seems to have been assumed in that case, in accordance with *Sterndale* v. *Hankinson* (1827), 1 Sim. 393, that the presentation of the petition for sale stopped the statute as regards all persons interested. But in *Re Nixon's Estate* (1874), Ir. R. 9 Eq. 7, the Court of Appeal, who were not satisfied with *Re Colclough*, declined to allow that the statute was stopped till the order for sale. "The *rationale* of the decision in *Re Colclough*," said Christian, L.J., "is that it rests on the order for sale, and not on the lodging of the petition, and it is in that sense that I now submit to and follow it." And he intimated that it would be more in accordance with the combined operation of the Statute of Limitations and the Irish Land Acts to hold that the incumbrance was simply transferred from the land to the money, so that the running of the statute would not be interfered with. In order, however, not to unsettle the law, he followed *Re Colclough* to the extent indicated: *cf. Irish Land Commission* v. *Davies* (1891), 27 L. R. Ir. 334; see *Re Conlan's Estate* (1892), 29 L. R. Ir. 199. Similarly, a vesting order made by the Land Commission under the Purchase of Land (Ireland) Acts, 1885 to 1896, stops the statute as from its date in favour of incumbrancers on the land: *Re Smithwick's Estate*, [1896] 2 I. R. 401. Sale in incumbered estates court.

It follows that where an annuity is charged on the land sold, the arrears of the annuity are recoverable for a period going back to six years before the order for sale, and so, too, as to arrears of interest: *cf. Re Smithwick's Estate* (*supra*); *Re*

Belton's Estate, [1894] 1 I. R. 537. And the effect of the order of sale is not limited to incumbrances existing at the date of the order. Notwithstanding an order for sale made on an incumbrancer's petition, the owner can still create a valid incumbrance on the land, which will be protected by the order against the operation of the statute: *Re Swanton's Estate*, [1898] 1 I. R. 157; *Re Morrison's Estate*, [1907] 1 I. R. 15, C. A.

Effect of presentation of petition.

As regards the incumbrancer who presents the petition, the statute is stopped from the date of presentation. The filing of the petition is a proceeding to recover money charged on land, and saves the statute until the petition is dismissed: *Irish Land Commission* v. *Davies* (1891), 27 L. R. Ir. 334; *Re Stinson's Estate* (1892), 29 L. R. Ir. 490. If, however, the petition is dismissed, the statute is to be taken as having been running without check: *Irish Land Commission* v. *Davies*.

Tithe rent-charge.

A tithe rent-charge owner is not interested in the proceeds of sale within the meaning of *Re Colclough and Re Nixon* (*supra*), since tithe rent-charge is by sect. 62 of the Landed Estates Court Act, 1858 (21 & 22 Vict. c. 72), expressly exempted from being affected by the conveyance by the Court. Hence the order for sale does not stop the running of the statute against a tithe rent-charge owner: *Re Wade's Estate* (1884), 13 L. R. Ir. 515, C. A.

Sale under Land Purchase Acts.

And the rule in *Re Colclough* does not apply where land is sold by an owner to tenants under the Purchase of Land (Ireland) Acts, 1885 to 1896, if the sale is carried out by conveyance, though possibly it might apply where the sale is carried out by vesting order: *Re Bateson*, [1896] 2 I. R. 171, C. A.

Stranger in possession.

A stranger who is in possession of the land at the time of the proceedings, and in whose favour the statute is running, is not affected by the order of sale. The petition is not an action for the recovery of land, and the statute continues to run: *Re Taafe's Estate* (1878), 1 L. R. Ir. 387.

Action stopped by sale.

Where an action already commenced was stopped by a sale by the Landed Estates Court, the statute was checked as from the commencement of the action: *Re Lawder* (1857), 6 Ir. Ch. R. 587.

(4) *Bankruptcy and Winding-up.*

Bankruptcy.

The debts provable in bankruptcy include all those to which the debtor is liable at the date of the receiving order: Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 37 (3). Consequently the

statute ceases to run against creditors as from the date of such order: see *Ex parte Ross* (1827), 2 Glyn & J. 330; *Re General Rolling Stock Co.* (1872), 7 Ch. p. 650; and when a claim has been proved, it is not destroyed by delay in applying for dividends: *Ex parte Healey* (1832), 1 Deac. & Ch. 361. But the pending of a liquidation by arrangement does not prevent the statute running in favour of a debtor to the estate. It runs, therefore, in favour of a third party who has received rents which the trustee in the liquidation could claim: *Re Mansel* (1892), 66 L. T. 245, C. A.

A winding-up order stops the running of the statute against creditors of the company, so that all creditors can prove whose claims were not barred at the date when the order was made. Upon the making of the order it becomes the duty of the Court under the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 98, to cause the assets of the company to be collected, and applied in discharge of its liabilities—that is, the liabilities which exist at the time of the winding-up order. "I think," said Mellish, L.J., in *Re General Rolling Stock Co.* (1872), 7 Ch. p. 649, referring to this section, "we must consider that the legislature intended us to follow the analogy of other cases where the assets of a debtor are to be divided amongst his creditors, whether in bankruptcy or insolvency, or under a trust for creditors, or under a decree of the Court of Chancery in an administration suit. In these cases the rule is that anybody who had a subsisting claim at the time of the adjudication, the insolvency, the creation of the trust for creditors, or the administration decree, is entitled to participate in the assets, and that the Statute of Limitations does not run against this claim; but, as long as assets remain unadministered, he is at liberty to come in and prove his claim, not disturbing any former dividend." Winding-up.

It had been held on the earlier Companies Acts that a winding-up order did not suspend the operation of the statute: *Re Royal Bank of Australia, Ex parte Forest* (1860), 2 Giff. 42; though it was suspended by the carrying in of a claim by the creditor: *Re Great Western, etc., Ry. Co., Ex parte Wryghte* (1852), 5 De G. & Sm. 244; *Re Warwick and Worcester Ry. Co.* (1858), 27 L. J. Ch. 735; see *Re London and Birmingham, etc., Ry. Co., Ex parte Higgins* (1856), 2 Jur. N. S. 178.

(5) *Property under the Control of the Court.*

Money in Court.

Where money is paid into Court by trustees, the Court is not thereby constituted a trustee for all persons having claims on the fund, but only for the immediate *cestui que trusts*. Hence an annuity granted by a *cestui que trust*, and charged on his interest, is liable to be barred notwithstanding that the trust funds have been brought into Court: *Re Nugent's Trusts* (1885), 19 L. R. Ir. 140. But in general the Court holds funds *in usum jus habentium*, and is in effect a trustee for the parties equitably entitled: *Howlin* v. *Sheppard* (1870), Ir. R. 6 Eq. 38; *cf. Re Slacke's Estate*, [1896] 1 I. R. p. 199, C. A.; *Lancaster* v. *Evors* (1846), 10 Beav. 154.

In *Howlin* v. *Sheppard* (*supra*), where a fund arising from the produce of rents during a life estate remained in Court from 1815 to 1870, the estate of a remainderman, who had paid charges which should have fallen on the life estate, was still entitled to be recouped out of the fund: *cf. Alsop* v. *Bell* (1857), 24 Beav. 451. And where money is paid into Court in a bankruptcy to meet the admitted claims of creditors who cannot be found, the statute does not run against them; but if no claim is made within six years it may be paid out to the debtor upon his giving reasonable security to repay it should the creditors appear and claim it: *Re Dennis*, [1895] 2 Q. B. 630. And where a fund is in Court in an administration suit there is no equity which makes time run against the right of a creditor to come in and prove: *Harrison* v. *Kirk*, [1904] A. C. 1; provided, of course, that he was not already barred at the date of the judgment for administration.

Possession of receiver.

(i.) Statute saved as regards parties to suit.

Possession taken by a receiver appointed by the Court is deemed to be the possession of all the parties to the suit according to their titles: *Re Butler's Estate* (1863), 13 Ir. Ch. R. 453: *cf.* 2 Atk. 15, case 14; *Dixon* v. *Gayfere* (1853), 17 Beav. 421; *Re Wade's Estate* (1884), 13 L. R. Ir. 515; and also of persons who are entitled to the benefit of the suit. "The order appointing the receiver," said Lord Eldon, C., in *Gresley* v. *Adderley* (1818), 1 Swanst. p. 579, "is for the benefit of incumbrancers only so far as expressed to be for their benefit, and only so far as they choose to avail themselves of it." This includes an incumbrancer to whom notice of the order is given, and who is thereby induced to rely upon it: *Penney* v. *Todd*

(1878), 26 W. R. 502. But to avoid the running of the statute against an incumbrancer, the receiver must be in possession of the estate sought to be charged: *Re Greene's Estate* (1884), 13 L. R. Ir. 461, p. 468, C. A.

(ii.) Statute continues to run against stranger to suit;

Where, on the other hand, a receiver is appointed in the interest of a person in possession, in whose favour the statute is running against a stranger to the suit, the possession remains unaffected, and the running of the statute is not stopped: *Harrison* v. *Duignan* (1842), 2 Dr. & War. 295. Similarly the statute continues to run where the receiver is appointed at the instance of the creditors of the person in possession. The ground of the appointment is the *jus possessionis*, and it is an affirmance rather than a disturbance of the possession: *Groome* v. *Blake* (1858), 8 Ir. C. L. R. 428. And as the appointment of a receiver does not prevent the statute continuing to run against a person entitled who is a stranger to the suit, so, conversely, when a receiver is appointed and obtains possession, the statute then ceases to run in favour of a former adverse possessor: *Wrixon* v. *Vize* (1842), 3 Dr. & War. 104. The possession of the Court by its receiver is the possession of the suitor, and time cannot run against a person in possession. Tenants who treat with the receiver for purchase on the footing of being tenants, and subsequently pay no rent for the statutory period, cannot at the same time decline in one proceeding to pay arrears of rent on the ground that they are purchasers, and in another to complete the purchase on the ground that they have become entitled as owners under the statute: *Re Slacke's Estate*, [1896] 1 I. R. 191.

or ceases to run in his favour.

Section II.—Acknowledgment and Part Payment.

Statutory Provisions.

When the statute is running its operation can be stopped, and a fresh commencement given to it, by acknowledgment or part payment.

Owner out of possession.

1. *Land and Rent.*—Where land is out of the possession of the owner, under such circumstances that the statute is running against him, his title is kept alive by an acknowledgment in writing signed by the person in possession and given to the owner or his agent; and similarly where the statute is running against a person entitled to a rent-charge :—

R. P. L. A., 1833, s. 14.

Acknowledgment of title to land or rent.

> "When any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing, signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom, or to whose agent, such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given."

This section appears to apply to lands of a spiritual or eleemosynary corporation sole, as to which a special limitation is provided by R. P. L. A., 1833, s. 29; but not to advowsons: ss. 30–33.

Mortgagor in possession.

2. *Land or Rent in Mortgage.*—Where land is mortgaged, and the mortgagor is in possession, the title of the mortgagee is kept alive by "payment of any part of the principal money or interest secured by the mortgage": R. P. L. A., 1837 (1 Vict. c. 28), *supra*, p. 85.

Mortgagee in possession.

Where the mortgagee is in possession the title of the mortgagor is kept alive by an acknowledgment in writing signed by the mortgagee and given to the mortgagor or his agent :—

"When a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within twelve years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him; and in such case no such action or suit shall be brought but within twelve years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given."

R. P. L. A., 1874, s. 7. Acknowledgment by mortgagee in possession.

The provisions of the section relating to the case of several mortgagors or mortgagees are stated subsequently: *infra*, p. 337.

3. *Money charged on Land, etc.*—The right to recover money charged on land or on a rent-charge, or secured by judgment, and legacies and shares of intestates' estates, is kept alive by part payment of principal or payment of interest, or by acknowledgment in writing, signed by the person liable to pay, or his agent, and given to the person entitled or his agent:—

"No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

R. P. L. A., 1874, s. 8. Part-payment and acknowledgment of money charged on land, etc.

Similar provision with regard to shares of intestates' estates is made by sect. 13 of the Law of Property Amendment Act, 1860 (*supra*, p. 169).

4. *Arrears of Rent and Interest.*—The right to recover arrears of rent, or of interest in respect of money charged on land or on a rent-charge, or of interest in respect of legacies, is kept alive by

acknowledgment in writing, signed by the person liable to pay, or his agent, and given to the person entitled, or his agent:—

R. P. L. A., 1833, s. 42. Acknowledgment of arrears of rent and interest.

> "No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent."

5. *Specialty Debts.*—The right to recover specialty debts is kept alive by acknowledgment in writing, signed by the person liable to pay or his agent, or by part payment on account of principal or interest; and if at the time of the acknowledgment or part payment the creditor is under disability, or the debtor is beyond seas, the running of the statute is postponed till the disability has ceased, or the debtor has returned:—

Civil Procedure Act, 1833, s. 5. Acknowledgment of specialty debts by writing or part payment.

> "If any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid, or in case the person or persons entitled to such action shall at the time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making the same, beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond seas, as the case may be . . ."

The corresponding Irish enactment is the Irish C. L. P. Amendment Act, 1853 (16 & 17 Vict. c. 113), s. 23. These provisions apply only to cases of money secured by specialty. A bond given to secure the replacement of stock is not kept alive by acknowledgment: *Blair* v. *Ormond* (1851), 17 Q. B. 423, p. 436.

6. *Simple Contract Debts.*—In the case of simple contract debts, acknowledgment and part payment have no direct statutory effect,

but they may operate as a fresh promise to pay the debt, and then a new cause of action accrues upon the fresh promise. The acknowledgment, however, must be in writing, signed by the party chargeable or his duly authorized agent:—

Statute of Frauds Amendment Act, 1828, s. 1.

Acknowledgment of simple contract debt to be in writing.

> "In actions of debt or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of [the Limitation Act, 1623], or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby . . . Provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever."

Acknowledgment by agent.

The corresponding Irish enactment is the Irish C. L. P. Amendment Act, 1853, s. 24. With reference to these two enactments provision for acknowledgment by an agent is made as follows:—

Mercantile Law Amendment Act, 1856, s. 13.

> "An acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorized to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself."

The provisions as to acknowledgment in the case of co-contractors, and as to part-payment by one co-debtor, are stated subsequently: *infra*, pp. 353, 373.

Pleading Acknowledgment and Part Payment.

Pleading in reply.

Where a plaintiff against whom the statute is set up proposes to defeat the statute by an acknowledgment or part payment, he must set this out in his reply and state the mode in which the acknowledgment or part payment was made: *Forsyth* v. *Bristowe* (1853), 8 Ex. 347; Civil Procedure Act, 1833, s. 5; though where the acknowledgment is in writing it is not necessary to set out the actual words: *Kempe* v. *Gibbon* (1848), 12 Q. B. 662. Formerly it appears to have been the practice in Ireland for the defendant, in pleading the statute, specifically to deny acknowledgment: *Molony* v. *O'Brien* (1842), 5 Ir. L. R. 577.

Simple contract debts.

But since an acknowledgment of a simple contract debt operates only as a fresh promise to pay the debt, and excludes the statute because the cause of action is assumed to lie in the

new promise, it was formerly not correct to allege the acknowledgment in reply; nor, if it was given between the original parties, was it necessary to set it out in the declaration—that is, the statement of claim. The plaintiff simply joined issue on the plea of the statute, and he was allowed to give the acknowledgment in evidence as supporting the declaration. For the purpose of the statute the new promise was treated as incorporated in the declaration: see *Tanner* v. *Smart* (1827), 6 B. & C. p. 607; *Short* v. *M'Carthy* (1820), 3 B. & A. p. 631; *Upton* v. *Else* (1827), 12 Moore, 303. And similarly, since part payment was only evidence of a fresh promise, it was neither proper to allege it in the declaration (*Hollis* v. *Palmer* (1836), 2 Bing. N. C. p. 717), nor to plead it in reply: *Ridd* v. *Moggridge* (1857), 2 H. & N. 567.

Acknowledgment by or to executors.

Where, however, the acknowledgment or payment took place between parties other than the original parties to the contract, it did not support the promise as laid in the declaration and required to be specially alleged: *Lechmere* v. *Fletcher* (1833), 1 Cr. & M. 623. Thus where the fresh promise was to an executor it had to be stated in the declaration, and could not be given in evidence in answer to a plea of the statute: *Short* v. *M'Carthy* (*supra*); *Timmis* v. *Platt* (1837), 2 M. & W. 720; *Browning* v. *Paris* (1839), 5 M. & W. p. 120; *cf.* *Williams* v. *Gun* (1711), Fortescue, p. 180; and, similarly, where one of the parties to the contract was an unmarried woman, and before the acknowledgment the parties liable had been varied by her marriage: *Pittam* v. *Foster* (1823), 1 B. & C. 248; *cf.* *Beck* v. *Pierce* (1889), 23 Q. B. D. 316.

Present system.

Under the present system of pleading it is still necessary to allege in the statement of claim an acknowledgment or payment made to or by an executor or other person who was not an original party to the contract, since this is required in order to support the action; and, even when the acknowledgment or payment is between the original parties, it is a material fact which should now appear upon the pleadings, either in the statement of claim or in the reply. If it is known that the plaintiff will require to rely upon it, it should be alleged in the claim; and at the same time there should be added an allegation that the defendant by such acknowledgment or payment promised to pay the debt or the balance, this being an inference which the Court will not draw: *Ridd* v. *Moggridge* (1857), 2 H. & N. 567.

I. ACKNOWLEDGMENT.

The effect of the foregoing provisions as to acknowledgment may be tabulated as follows:— Summary.

Subject-matter.	Statute.	Form.	By whom given.	To whom given.
Land or rent-charge	R.P.L.A., 1833, s. 14	In writing	Person in possession	Owner or agent
Land or rent-charge in possession of mortgagee	R.P.L.A., 1874, s. 7	In writing	The mortgagee	Mortgagor or agent
Money charged on land Judgment Legacy	R.P.L.A., 1874, s. 8	In writing	Person by whom payable or agent	Person entitled or agent
Intestates' estates	Law of Property Am. Act, 1860, s. 13	In writing	Person accountable or agent	Person entitled or agent
Arrears of rent or interest	R.P.L.A., 1833, s. 42	In writing	Person by whom payable or agent	Person entitled or agent
Specialty debts	Civ. Proc. Act, 1833, s. 5	In writing	The party liable, or agent	[*Not stated*]
Simple contract debts	Stat. of Frauds Am. Act, 1828, s. 1 Merc. Law Am. Act, 1856, s. 13	In writing	The party chargeable or agent	[*Not stated*]

In considering the operation of acknowledgment, it will be necessary to distinguish between (1) Land and money charged on land, etc., and specialty debts, as to which the effect of the acknowledgment depends on the statutes; and (2) Simple contract debts, as to which it depends on the doctrine of an implied fresh promise to pay.

(1) *Land and Money charged on Land, etc., and Specialty Debts.*

(i.) *By whom the Acknowledgment must be made.*

Land or rent.

In accordance with sect. 14 of the R. P. L. A., 1833, an acknowledgment of title to land or rent must be made by the person actually in possession of the land or in receipt of the rent. Acknowledgment by an agent will not suffice: *Ley* v. *Peter* (1858), 3 H. & N. 101; *cf. Hyde* v. *Johnson* (1836), 2 Bing. N. C. 776.

Money charged on land, and arrears of rent and interest.

An acknowledgment of a sum of money charged on land, or of arrears of interest, may be given "by the person by whom the same shall be payable or his agent." By "payable" it is not to be understood that the person making the acknowledgment must be personally liable to pay. It is sufficient that he is interested in the land, and is liable to lose the land if he does not pay. "The person designated in the fortieth section as the person by whom the money is payable must evidently mean, in the case of a claim by way of equitable lien, the person entitled to the land on which the charge is sought to be fixed. The money is payable by him in the only sense in which it is payable by any one. Unless he pays it, he will lose his land; and it is obviously in that sense that the statute in such a case speaks of the money as payable": *per* Lord Cranworth, L.J., in *Toft* v. *Stephenson* (1851), 1 D. M. & G. 28, where a vendor's lien was in question. "These words," said Lord Westbury, in *Bolding* v. *Lane* (1863), 1 D. J. & S. p. 133, "do not denote merely the persons who are legally bound by contract to pay the interest, but all the persons against whom the payment of such arrears may be enforced by any action or suit, and by whom, therefore, as they have a right to pay such interest in redemption of their land, interest may be properly said to be payable": *cf. Lord St. John* v. *Boughton* (1838), 9 Sim. 219. On the other hand, the acknowledgment cannot be effectually given by a person who was interested in the land, but who has parted with his interest: *Lyall* v. *Fluker*, W. N. (1873), p. 208.

Specialty debts.

An acknowledgment of a specialty debt must be made by the party liable by virtue of the specialty or his agent. The expression "the party liable" includes any person or persons against whom an action on the specialty could be brought, whether

liable originally, or as representing or taking the estate, real or personal, of the obligor: *Roddam* v. *Morley* (1857), 1 De G. & J. pp. 7, 8. Ref Russ Price 1909. 1KB. 577.

Acknowledgment by agent.

Where an acknowledgment can be made by an agent—that is, in all cases except title to land or rent—it is not necessary that the agency shall be expressly created. A *cestui que trust* may be regarded for this purpose as the agent of the trustee: *cf. Vincent* v. *Willington* (1842), Long. & T. 456. In *Toft* v. *Stephenson* (1851), 1 D. M. & G. 28, an acknowledgment by the solicitor of the persons by whom the money was payable was sufficient. But a Master in Chancery, in making a report, was held not to be the agent of the parties. He makes the report in his official capacity and not as representing them: *Hill* v. *Stawell* (1840), 2 Ir. L. R. 302; see *Barrett* v. *Birmingham* (1842), 4 Ir. Eq. R. p. 546.

(ii.) *To whom the Acknowledgment may be made.*

Land, money charged on land, and arrears of interest.

An acknowledgment, whether with reference to land, or to sums of money charged on land, or to arrears of rent or interest, must be given to the person entitled or his agent. Hence an acknowledgment to a third party is not effectual: *Batchelor* v. *Middleton* (1847), 6 Hare, p. 83; nor is an acknowledgment to a person before his title accrues (*Holland* v. *Clarke* (1842), 1 Y. & C. C. C. 151), or after it has ceased: *Markwick* v. *Hardingham* (1880), 15 C. D. p. 352, C. A. But in considering whether an acknowledgment is really made to the person entitled the Courts have adopted a liberal construction of the statute. "The question is," said Lord St. Leonards, in *Blair* v. *Nugent* (1846), 3 Jo. & Lat. p. 677, "whether it is an acknowledgment to the person entitled thereto or his agent. The cases show that the Court has not, in that respect, restricted itself within narrow limits. If it be made in a schedule, affidavit, or answer, it is sufficient, although it may be said that in those cases it is made to the Court and not to the party. The decisions are, I think, right; they proceed upon a liberal, but yet a fair and just construction of the statute": *Barrett* v. *Birmingham* (1842), 4 Ir. Eq. R. 537. But a statutory declaration as to a mortgage debt made by the mortgagor upon an inquiry in the lunacy of the mortgagee has been held not to be an acknowledgment made to the mortgagee or his agent: *Hervey* v. *Wynn* (1905), 22 T. L. R.

93; and the committee of a building society are not the agents of a mortgagor member to receive an acknowledgment: *Wilson* v. *Walton, etc., Building Society* (1903), 19 T. L. R. 408. But where land is ordered to be sold in an administration action to which the owners are parties, the solicitor having the carriage of the order is their agent to receive an acknowledgment: *Johnston* v. *Smith*, [1896] 2 I. R. 82.

Ratification of agency.

Where reliance is placed on an acknowledgment to an agent, it is sufficient that the acknowledgment is made to a person who is acting as an agent, and that his agency is subsequently ratified. In *Trulock* v. *Robey* (1841), 12 Sim. 402, an acknowledgment was contained in a letter written by a mortgagee in possession to the grandfather of the infant heiress-at-law of the mortgagor. "It would," said Shadwell, V.C., "be a forced construction to say that this was not an acknowledgment within the statute, or that it was not given to the agent of the person claiming the estate of the mortgagor. It is not necessary to make a person an agent, that he should have an actual authority to act. It is quite sufficient that the grandfather acted as the agent of his grandchild; and that she, when she came of age, adopted what he had done on her behalf."

Specialty debts.

As to specialty debts, it is not required by sect. 5 of the Civil Procedure Act, 1833, that the acknowledgment shall be made to the person entitled or his agent, and an acknowledgment given to a third party is sufficient: *Moodie* v. *Bannister* (1859), 4 Drew. 432; see *Howcutt* v. *Bonser* (1849), 3 Ex. 491. The suggestion to the contrary in *Grenfell* v. *Girdlestone* (1837), 2 Y. & C. Ex. p. 676, is founded on a mistake as to the scope of the Statute of Frauds Amendment Act, 1828, s. 1. But where such debts are also secured on land, the personal remedy is barred with the remedy against the land (*supra*, p. 157), and hence the acknowledgment must be given under sect. 8 of the R. P. L. A., 1874, to the person entitled or his agent.

(iii.) *Form of Acknowledgment.*

Writing necessary.

The acknowledgment must be in writing, but otherwise its form is only limited by the requirements, that it must be signed by the person making it, and must, except in the case of specialty debts, be made to the person whose title is acknowledged. Frequently it is contained in a letter or series of letters:

Fursdon v. *Clogg* (1842), 10 M. & W. 572; *Incorporated Society* v. *Richards* (1841), 1 Dr. & War. 258; *Jortin* v. *South-Eastern Ry. Co.* (1854), 6 D. M. & G. 270. A covenant in a mortgage deed may be an acknowledgment by the mortgagor of the mortgagee's title at the time of execution: *Jayne* v. *Hughes* (1854), 10 Ex. 430. But a transfer of a mortgage, to which the mortgagor is not a party, cannot operate as an admission of his title: *Lucas* v. *Dennison* (1843), 13 Sim. 584; *Batchelor* v. *Middleton* (1847), 6 Hare, 75. Nor can the keeping of accounts by the mortgagee: *Baker* v. *Welton* (1845), 14 Sim. 426.

Statements in judicial proceedings.

Under the old practice an answer in Chancery, since it was in writing signed by the defendant, and was given in answer to questions put by the plaintiff, was a sufficient acknowledgment: *Goode* v. *Job* (1858), 1 E. & E. 6; *Blair* v. *Nugent* (1846), 3 Jo. & Lat. p. 677. The fact that the answer was made under compulsion and upon oath did not detract from its efficacy as an acknowledgment, but rather the reverse: see *per* Erle, J., in *Goode* v. *Job*. And so with an affidavit: *Tristram* v. *Harte* (1841), Long. & T. 186; or a petition for sale of land in Ireland, describing the land in a schedule as subject to an incumbrance: *Re West* (1879), 3 L. R. Ir. 77; or the statement subscribed and filed by a bankrupt in bankruptcy proceedings: *Barrett* v. *Birmingham* (1842), 4 Ir. Eq. R. 537; *Murrogh* v. *Powers* (1842), 5 Ir. L. R. 494; see *Dugdale* v. *Vize* (1843), 5 Ir. L. R. 568; *Hanan* v. *Power* (1845), 8 Ir. L. R. 505. In bankruptcy the file of the proceedings is intended for the inspection of creditors, and hence an admission in the proceedings is in a sense made to the creditor concerned. But an acknowledgment by the bankrupt is not effectual as against his trustee, since the bankrupt cannot by his own act, subsequent to the bankruptcy, alter the rights of his creditors. It can only be taken advantage of in proceedings independent of the bankruptcy: *Pott* v. *Clegg* (1847), 16 M. & W. 321; *Re Clendinning* (1859), 9 Ir. Ch. R. 284; *Re Tollemache* (1884), 13 Q. B. D. 720. And a statement as to a mortgage debt, made by the mortgagor in judicial proceedings relating to the estate of the mortgagee, is not necessarily an acknowledgment. It may be made for some other purpose than to admit the debt: *Hervey* v. *Wynn* (1905), 22 T. L. R. 93.

Will.

Upon the principle of the above cases a direction in a will for payment of a judgment creditor has been held to operate as an acknowledgment: *Millington* v. *Thompson* (1852), 3 Ir. Ch.

R. 236. "A will," said Blackburne, L.C., "which must be published at the testator's death, which must be signed, and must be accessible to the creditor, satisfies every imaginable end that we can attribute to the legislature. As a recognition of the debt it is just as significant as an insolvent's schedule; and the intention of the debtor that the creditor shall have notice, is just as unequivocal in the one case as in the other." But the will must be precise. A mere vague reference to a possible outstanding debt is insufficient: *Scott* v. *Synge* (1891), 27 L. R. Ir. p. 567, C. A.; *vide supra*, p. 158.

Signature.

The acknowledgment must be signed by the party giving it, whether as principal, or, if signature by an agent is allowed, as agent. In *Re Clendinning* (1859), 9 Ir. Ch. R. 284, it seems to have been thought that a mark affixed by a person who was too ill to write would not be effectual; though under such circumstances another may sign in his presence and at his direction: *Corporation of Dublin* v. *Judge* (1847), 11 Ir. L. R. 8. And where an agent, unable to write, held the top of the pen while his daughter wrote his name, this was held to be effectual: *Helshaw* v. *Langley* (1841), 11 L. J. Ch. 17. A signature of initials is effectual if there is evidence that they represent the name of the writer: *Lord St. John* v. *Boughton* (1838), 9 Sim. 219; and see cases cited *infra*, p. 343.

Parol evidence.

Although the acknowledgment itself must be in writing, it may be supplemented by parol evidence, as, in the case of an acknowledgment of a debt, by evidence of the amount of the debt. "The Act allows of considerable latitude as to the form of the acknowledgment; and consequently it is not necessary that the acknowledgment should state the amount of the sum alleged to be due. If it refers to the thing in question it is sufficient": *Lord St. John* v. *Boughton* (1838), 9 Sim. p. 225, *per* Shadwell, V.C., referring to R. P. L. A., 1833, s. 40. And although the document is dated, evidence may be given to show that it was in fact executed subsequently, and it will then take effect as an acknowledgment from the date of actual execution: *Jayne* v. *Hughes* (1854), 10 Ex. 430.

(iv.) *Construction of Acknowledgment.*

Construction is for judge.

The question of the sufficiency of the acknowledgment depends on the construction of a written instrument, and is therefore for the judge: *infra*, p. 345; though in *Incorporated*

Society v. *Richards* (1841), 1 Dr. & War. p. 290, Lord St. Leonards thought that the construction of a series of letters should be left to the jury.

Title to land.

It has been argued that, to satisfy the statute, the writing relied on as an acknowledgment should contain an express admission of title (*Goode* v. *Job* (1858), 1 E. &. E. 6; *Jayne* v. *Hughes* (1854), 10 Ex. 430); but the authorities do not countenance this doctrine, and any writing is sufficient which, either expressly or by implication, contains an admission of title. A mere admission of a title once existing is not necessarily an admission that it exists at the date of the acknowledgment: *Hobson* v. *Burns* (1849), 13 L. R. Ir. 286. Hence, though a covenant in a mortgage deed is an admission of the relation in which the parties stand at the date of execution (*Jayne* v. *Hughes* (1854), 10 Ex. 430), so as to constitute an acknowledgment by the mortgagor of the mortgagee's title, it is otherwise with a mere recital of an earlier mortgage: *Howcutt* v. *Bonser* (1849), 3 Ex. 491.

Cases of acknowledgment.

The following are cases in which acknowledgments of title to land have been effectively made:—

Where an occupier of land, in reply to a demand for rent, claimed compensation for the expense of litigation in which he had been involved with respect to the land: *Fursdon* v. *Clogg* (1842), 10 M. & W. 572.

Where an occupier made a proposal for a lease to the person claiming as owner: *Corporation of Dublin* v. *Judge* (1847), 11 Ir. L. R. 8.

Where an order for sale had been made in an administration action, and the tenant of the land to be sold sent in to the solicitor of the party having the carriage of the order a written proposal for purchase: *Johnston* v. *Smith*, [1896] 2 I. R. 82.

Where in 1839 the occupier admitted that in 1811 he had entered into an agreement for a lease with the claimant's predecessor in title, and had ever since occupied the land. This was an admission of a continuing tenancy, and consequently an acknowledgment of the claimant's title at the later date: *Goode* v. *Job* (1858), 1 E. & E. 6.

An incumbrancer on land purchased the interest of the tenant for life, and remained in possession after her death, which took place in 1811. In 1820 and 1821

correspondence took place between him and the Incorporated Society, who were entitled in remainder, in which, while he did not admit that the title of the Society was free from doubt, he professed to be ready to account, and stated that he had no further claim than for the sum which such account might show to be due. Upon the whole correspondence there was an acknowledgment of the Society's title: *Incorporated Society* v. *Richards* (1841), 1 Dr. & War. 258.

Where a mortgagee in possession expressed his willingness to settle: *Trulock* v. *Robey* (1841), 12 Sim. 402.

Where a mortgagee in possession, in answer to the request of the mortgagor's solicitor for a meeting, wrote:—"I do not see the use of a meeting either here or at Manchester, unless some party is ready with the money to pay me off." In answer to the objection that this did not acknowledge the title of any particular person as mortgagor, the Court of Appeal held that it was an acknowledgment of the title of the persons for whom the solicitor was acting: *Stansfield* v. *Hobson* (1853), 16 Beav. 236; on appeal, 3 D. M. & G. 620.

Acknowledgment not made.

There was no acknowledgment in the following cases:—

Where the person in possession, upon application being made by the claimant for payment of rent, with an offer of a lease, wrote:—"Although, if matters were contested, I am of opinion that I should establish a legal right to the premises, yet, under all the circumstances, I have at length determined to accede to the proposal you made of paying a moderate rent on an agreement for a term of twenty-one years: *Doe* v. *Edmonds* (1840), 6 M. & W. 295.

Where a mortgagee in possession wrote denying the claimant's title, but adding that an account would in any case be useless, because the rents and profits had never been sufficient to keep down interest. If such a letter, observed Romilly, M.R., was to be treated as an acknowledgment of the claimant's right to redeem, no one could safely answer a solicitor's letter, except to say that he refused to give any reply: *Thompson* v. *Bowyer* (1863), 11 W. R. 975.

Sums charged on land; arrears

As to sums of money charged on land and arrears of interest, and as to specialty debts, the acknowledgment need not amount

to a promise to pay, such as is necessary in the case of a simple contract debt. An admission of the liability is sufficient. Thus in *Lord St. John* v. *Boughton* (1838), 9 Sim. 219, a letter containing the words, "Be assured that I shall be happy to discharge the bonds to the late Mr. Aubert as soon as it is in my power," and in *Carroll* v. *Darcy* (1847), 10 Ir. Eq. R. 321, p. 330, an offer to pay a judgment debt out of a particular fund, were held to be acknowledgments; although in the former case there would have been no complete promise without proof of ability to pay, and in the latter no personal promise at all would have been implied: *infra*, p. 349. Nor does the acknowledgment create a personal liability if there was no such liability before: *Lord St. John* v. *Boughton* (*supra*). of interest; and specialty debts.

(v.) *When Acknowledgment may be made.*

The effect of an acknowledgment of title to land or rent is not to secure the title of the owner by rendering the possession non-adverse, but merely to give a fresh starting-point for the statute which thereupon at once commences to run afresh: *Scott* v. *Nixon* (1843), 3 Dr. & War. p. 404; *cf. Burroughs* v. *M'Creight* (1844), 1 Jo. & Lat. p. 304. But when the statute has run, so that the title of the true owner is extinguished under sect. 34 of the R. P. L. A., 1833, no subsequent acknowledgment will revive it: *Sanders* v. *Sanders* (1881), 19 C. D. 373, C. A. It is the same with regard to an acknowledgment by a mortgagee in possession under sect. 7 of the R. P. L. A., 1874, notwithstanding the contrary decision in *Stansfield* v. *Hobson* (1853), 3 D. M. & G. 620, on sect. 28 of the Act of 1833. And similarly, an acknowledgment by the mortgagor will not revive the mortgagee's title after it has been extinguished: *Beamish* v. *Whitney*, [1908] 1 Ir. 38. Title to land.

Sect. 8 of the Act of 1874, like sect. 40 of the Act of 1833, suspends the remedy only, leaving the right to a sum of money charged on land in existence, and hence in this case the principle just stated does not apply. On the words of the section it is not clear whether the acknowledgment must be made before the statute has run. The action must be brought within twelve years after the "present right to receive" has accrued, unless "in the mean time" an acknowledgment has been given. The words "in the mean time" might refer to the period before the expiration of the twelve years, so that an acknowledgment after Money charged on land.

that time would be ineffectual; and this is so where the plaintiff is a mortgagee, and his title as such is extinguished: *Hervey* v. *Wynn* (1905), 22 T. L. R. 93. The phrase, however, has been referred to the period between the accrual of the right to receive and the commencement of the action, so that the acknowledgment is effectual notwithstanding that the statutory period has elapsed: *Harty* v. *Davis* (1850), 13 Ir. L. R. 23; *Re Lord Clifden*, [1900] 1 Ch. 774; *cf. Latouche* v. *O'Brien* (1846), 10 Ir. Eq. R. 113. But an acknowledgment so given by a tenant for life is not effectual against the remaindermen: *infra*, p. 337.

Specialty debts and arrears of interest.

Under sect. 5 of the Civil Procedure Act, 1833, an acknowledgment of a specialty debt can be given at any time, and the statute runs afresh from the date of the acknowledgment, notwithstanding that this is subsequent to the lapse of the statutory period of twenty years; and, similarly, under sect. 42 of the R. P. L. A., 1833, there is no restriction as to the time within which an acknowledgment of arrears of interest can be given.

(vi.) *The Effect of the Acknowledgment.*

Title to land.

In the case of an acknowledgment of title to land, the acknowledgment, if duly given by the person in possession, supports the title of the owner to recover the land, as well against such person, as against any other possessor during the new currency of the statute.

Title to money.

But in the case of an acknowledgment of title to money, whether charged on land or secured by specialty, the question frequently arises whether the acknowledgment is effectual to keep alive the claim generally, or only as against the person making the acknowledgment. In general it is effectual only as against the person making it, and persons claiming under him. Thus, in *Bolding* v. *Lane* (1863), 1 D. J. & S. 122, Lord Westbury, C., held that an acknowledgment by a mortgagor of more than six years' arrears of interest being due on a first mortgage did not preclude a subsequent mortgagee from relying upon the statute. The intention of sect. 42, he said, was "to enact a plain and simple rule, that no person having a charge on lands shall recover more than six years' interest on such charge against any other person having an interest in the lands without an acknowledgment in writing, signed by such person, or by some former owner from whom the interest is derived." And

where land has been devised to trustees, an acknowledgment by them will not be effectual to keep alive a charge on the land, or to extend the period for which interest can be claimed, unless it is given by all the trustees: *Astbury* v. *Astbury*, [1898] 2 Ch. 111.

Acknowledgment by tenant for life.

If, however, the person making the acknowledgment is a limited owner in possession of the land, then, since for the time being he represents the ownership of the land, his acknowledgment will be binding on the remaindermen, so as to keep alive against them a principal sum or arrears of interest: *Smith* v. *Smith* (1855), 5 Ir. Ch. R. 88; *Re Fitzmaurices* (1864), 15 Ir. Ch. R. 445; though, assuming an acknowledgment to be effectual when the statute has already run (as to which see *supra*, p. 335), the tenant for life cannot, after that period, revive by acknowledgment a charge or a claim to arrears of interest against the remaindermen: *Gregson* v. *Hindley* (1846), 10 Jur. 383; *Smith* v. *Smith* (*supra*); *Becher* v. *Delacour* (1881), 11 L. R. Ir. 187; *cf. Homan* v. *Andrews* (1850), 1 Ir. Ch. R. p. 117.

Several Mortgagors or Mortgagees.

Several mortgagors or mortgagees.

The effect of acknowledgment in keeping alive the equity of redemption where there are several mortgagors or mortgagees is regulated by sect. 7 of the R. P. L. A., 1874.

Where there are several mortgagors, an acknowledgment given to one by the mortgagee in possession is as effectual as if given to all:—

R. P. L. A., 1874, s. 7. Several mortgagors.

> "When there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons."

Where there are several mortgagees in possession, an acknowledgment given by one is effectual only as against that one:—

R. P. L. A., 1874, s. 7. Several mortgagees.

> "Where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or

under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent."

Mortgagees entitled to divided shares of the land.

And where several mortgagees are entitled to divided shares of the land, but not to ascertained parts of the mortgage money, the acknowledgment confers on the mortgagor a right to redeem the divided share of the mortgagee giving it on paying a corresponding part of the mortgage money :—

R. P. L. A., 1874, s. 7. Mortgagees entitled to divided shares of land.

"Where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage."

Effect of sect. 7.

Thus, if there are several mortgagees, A., B., and C., an acknowledgment by A. does not operate to give the mortgagor a right to redeem as against B. and C., whether they are entitled to a divided or undivided part of the money or land; and if A. is entitled to a divided part of the land—say, one-third—but not to an ascertained part of the purchase money, the mortgagor will be entitled to redeem A. on payment of one-third of the amount. But these provisions do not apply to the case of trustee-mortgagees, who have advanced money on a joint account, for the accounts to be taken on redemption would require the presence of both trustees, and hence the right is not kept alive at all unless it is kept alive against both by the acknowledgment of both: *Richardson* v. *Younge* (1870), 6 Ch. 478. The clauses only apply where there are divided interests either in the money or in the land.

(2) Simple Contract Debts.

(i.) *The Doctrine of Implied Promise.*

Promise to pay.

The Limitation Act, 1623, contains no provision for keeping alive by acknowledgment a claim liable to be barred under that Act, but the omission was supplied by judicial decision. The principle upon which an acknowledgment could be effectually made was for a long time doubtful, and opinions varied whether a mere admission of the claim was sufficient, or whether the acknowledgment must amount to a promise to pay. At length the doubt was set at rest by *Tanner* v. *Smart* (1827), 6 B. & C. 603, and it has not since been questioned (see *per* Bowen, L.J., in *Green* v. *Humphreys* (1884), 26 C. D. p. 479), that an acknowledgment of a claim on a simple contract will only keep it alive if the acknowledgment amounts to a fresh promise to pay. The reason for this was found in the fact that the original cause of action was barred by the absolute provision of the statute, and no relief could be given to the plaintiff unless he could show a new cause of action within six years. The promise to pay gave this new cause of action, and though, if the promise was between the same parties as the original contract, it was not necessary to set it out in the declaration, yet, for the purposes of the statute, the new promise was considered to be incorporated in the declaration.

The new promise.

It followed that, for the acknowledgment to be effectual, the new promise which it implied must correspond with the original contract alleged in the declaration. "The only principle," said Lord Tenterden, C.J., in *Tanner* v. *Smart*, "upon which the acknowledgment can be held to be an answer to the statute is this, that an acknowledgment is evidence of a new promise, and, as such, constitutes a new cause of action, and supports and establishes the promises which the declaration states. Upon this principle, whenever the acknowledgment supports any of the promises in the declaration, the plaintiff succeeds; when it does not support them (though it may show clearly enough that the debt has never been paid, but is still a subsisting debt), the plaintiff fails." Consequently an acknowledgment can only preserve a claim to payment of a debt; the doctrine has no application to an action of tort: *Hurst* v. *Parker* (1817), 1 B. & A. 92; *Tanner* v. *Smart* (*loc. cit.*, p. 606); or to an action

for breach of a contract to do or not to do a specified act, other than the payment of money: *Boydell* v. *Drummond* (1808), 2 Camp. p. 160; see *Whitehead* v. *Howard* (1820), 2 Br. & B. 372; *Short* v. *McCarthy* (1820), 3 B. & A. 626.

Implied promise.

For a promise to operate as an acknowledgment it need not be express nor need it be absolute. An implied promise is sufficient, and from a simple acknowledgment of a debt a promise to pay will be implied. So again the promise need not be an absolute promise to pay forthwith or on request. It may be conditional upon the happening of a specified event, such as the defendant's obtaining means to pay; or it may be a promise to pay after a certain period. In such cases there is no cause of action on the new promise, and the bar of the statute is not excluded, until the event has happened or the period has elapsed, so that the conditional promise is turned into an immediate absolute promise.

Conditional promise.

Judicial statements of the rule.

The above principles are stated in the following passages:—

"Upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may, and ought to be implied; but where the party guards his acknowledgment, and accompanies it with an express declaration to prevent any such implication, why shall not the rule *expressum facit cessare tacitum* apply?"—*per* Lord Tenterden, C.J., in *Tanner* v. *Smart* (1827), 6 B. & C. p. 609.

"The legal effect of an acknowledgment of a debt barred by the Statute of Limitations is that of a promise to pay the old debt, and for this purpose the old debt is a consideration in law. In that sense, and for that purpose, the old debt may be said to be revived. It is revived as a consideration for the new promise. But the new promise, and not the old debt, is the measure of the creditor's right. If the debtor simply acknowledges the old debt, the law implies from that acknowledgment a promise to pay it; for which promise the old debt is a sufficient consideration. But if the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him": *per* Wigram, V.C., in *Philips* v. *Philips* (1844), 3 Hare, p. 299.

"There must be one of these three things to take a case out of the statute: Either there must be an acknowledgment of the debt from which a promise to pay is to be implied; or,

secondly, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt and evidence that the condition has been performed": *per* Mellish, L.J., in *Re River Steamship Co., Mitchell's Claim* (1871), 6 Ch. p. 828. See also *per* Parke, B., in *Smith* v. *Thorne* (1852), 18 Q. B. p. 143; *per* Channell, B., in *Lee* v. *Wilmot* (1866), L. R. 1 Ex. p. 367; *per* Amphlett, B., in *Chasemore* v. *Turner* (1875), L. R. 10 Q. B. p. 507; and *Green* v. *Humphries* (1884), 26 C. D. p. 478, C. A., where Cotton, L.J., explained a dictum of Lord Blackburn's in *Morgan* v. *Rowlands* (1872), L. R. 7 Q. B., p. 498, that a promise must be inferred in fact, and not merely implied in law.

Circumstances rebutting acknowledgment.

It follows that where reliance is placed upon an acknowledgment as implying a promise to pay, it is essential that there shall be no words accompanying the acknowledgment which are inconsistent with such a promise; and, if the promise is conditional, that the condition shall have been performed. "A mere acknowledgment," said Bramwell, L.J., in *Meyerhoff* v. *Froehlich* (1878), 4 C. P. D., p. 65, "will be insufficient, if the debtor states either that he will not pay, or that he will pay only upon a condition which remains unfulfilled, or at a time which has not elapsed." And where the debtor accompanies his promise with a condition, it is not necessary for him to go further and say that, except on the performance of the condition, he will not, or cannot pay: *Barrett & Sons, Ltd.* v. *Davies* (1904), 91 L. T. 736, C. A. The attaching of a condition to the promise excludes an absolute acknowledgment.

(ii.) *By and to whom the Acknowledgment must be made.*

By party liable or his agent.

Since the acknowledgment operates as a fresh contract and revives the liability under the original contract, it follows that it must be given by, or on behalf of, the party originally liable, or some person on whom his liability has devolved, and this is recognized by the statutory provisions that it must be signed "by the party chargeable thereby"—that is the original contractor or his representative—or his agent: *supra*, p. 325; and if by an agent, the acknowledgment must be in fact within the scope of his agency: *Whitehouse* v. *Abberley* (1845), 1 C. & K. 642; *Curwen* v. *Milburn* (1889), 42 C. D., p. 432.

Executors.

Since the liability upon a simple contract debt continues after the death of the debtor, an acknowledgment may be given

by his personal representatives. It has been said that, as against them, an acknowledgment is only effectual if it is made in the form of an express promise: see *per* Abbott, C.J., in *Tullock* v. *Dunn* (1826), Ry. & M. 416. But there is no reason for departing in this case from the usual rule that a promise may be implied from the mere acknowledgment, though possibly the language used by a personal representative will be construed with special care: see *per* Bayley, J., in *M'Culloch* v. *Dawes* (1826), 9 D. & R. p. 43. Such a promise is not implied from an advertisement for creditors: *Scott* v. *Jones* (1838), 4 Cl. & F. 382. After an administration decree, an executor cannot by acknowledgment revive a debt as against the beneficiaries: *Phillips* v. *Beal*, No. 2 (1863), 32 Beav. 26. As regards acknowledgment by one of several co-executors, see *infra*, p. 354.

Infant.

An infant can make a binding contract for necessaries, and he can consequently, while still an infant, revive such a contract by acknowledgment: *Willins* v. *Smith* (1854), 4 E. & B. 180.

To creditor or his agent.

And since the acknowledgment operates as a promise, it follows that it must be made to the creditor or his agent: *Fuller* v. *Redman* (1859), 26 Beav. 614. It is ineffectual if made to a stranger: *Stamford, etc., Banking Co.* v. *Smith*, [1892] 1 Q. B. 765, C. A.; *Rogers* v. *Quinn* (1889), 26 L. R. Ir. 136. Hence a memorandum in the books of a company not communicated to the creditor cannot operate as an acknowledgment: *Bush* v. *Martin* (1863), 2 H. & C. 311; and it will not necessarily have this effect even though the creditor is a director and is a party to it: *Lowndes* v. *Garnett, etc., Co.* (1864), 33 L. J. Ch. 418.

Similarly, an entry by a debtor in his own books is not an acknowledgment. "There must be an acknowledgment amounting to a promise, either to the creditor or his agent, to pay the debt": *per* Pollock, C.B., in *Godwin* v. *Culley* (1859), 4 H. & N. p. 378. But it has been held that an admission of a debt made by the debtor on applying for probate of the will of the creditor is effective as an acknowledgment: *Re Emmett* (1906), 95 L. T. 755, where a debtor-executor included the debt in the Inland Revenue affidavit for probate: *Smith* v. *Poole* (1841), 12 Sim. 17, 10 L. J. Ch. 192; *Maniram* v. *Seth Rupchand* (1906), 22 T. L. R. 619, P. C., where an admission of an open and current account was made on applying for probate. These cases seem difficult to reconcile with the established principle.

(iii.) *Form of Acknowledgment.*

The acknowledgment must be in writing.

Under sect. 1 of the Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), known as Lord Tenderden's Act, and sect. 24 of the Irish Com. Law Proc. Act, 1853 (16 & 17 Vict. c. 113), the corresponding Irish enactment, an "acknowledgment or promise," in order to take a case out of the statute, must be in writing signed by the party chargeable thereby, or (by virtue of sect. 13 of the Mercantile Law Amendment Act, 1856) by his agent duly authorized to make such acknowledgment: see the provisions of the statutes, *supra*, p. 325. The use of the two words "acknowledgment" and "promise" does not imply that an acknowledgment need not amount to a promise. "The word 'acknowledgment' is used, not as meaning something different from 'promise,' but as applicable to actions of debt": *Sidwell* v. *Mason* (1857), 2 H. & N. 306, *per* Bramwell, B.; see *Kennett* v. *Milbank* (1831), 8 Bing. 38; *Meyerhoff* v. *Froehlich* (1878), 4 C. P. D. p. 65. And the Act does not alter the legal construction of documents; it only requires a different mode of proof: *Haydon* v. *Williams* (1830), 7 Bing. 163, p. 166; *Moodie* v. *Bannister* (1859), 4 Drew. p. 440. If the written acknowledgment has been lost, oral evidence of its contents can be given: *Haydon* v. *Williams*.

Verbal agreement as to amount due is insufficient.

Where the items of an account are all on one side, and the parties meet and agree verbally on the amount due, this does not exclude the necessity for a written acknowledgment: *Jones* v. *Ryder* (1838), 4 M. & W. 32. "The going through an account where there are items on one side only does not alter the situation of the parties at all, or constitute any new consideration": *Ashby* v. *James* (1843), 11 M. & W. 542, *per* Alderson, B. It had been held otherwise in *Smith* v. *Forty* (1829), 4 C. & P. 126. Such an account must be signed by the debtor, and, if he is a partner, before dissolution of partnership: *Bristow* v. *Müller* (1848), 11 Ir. L. R. 461.

Signature.

The acknowledgment must be signed by the party chargeable or his agent. The object of signing is to authenticate the genuineness of the document, and where the whole document is in the debtor's handwriting, it is sufficiently authenticated though the signature be at the commencement: *Holmes* v. *Mackrell* (1858), 3 C. B. N. S. 789; see *Lobb* v. *Stanley* (1844), 5 Q. B. 574, on the Bank. Act, 1826; *Ogilvie* v. *Foljambe* (1817),

3 Mer. 53, on the Statute of Frauds, s. 4; *Propert* v. *Parker* (1830), 1 R. & M. 625, on the same statute. But the document constituting the acknowledgment must be actually signed; it is not sufficient that it is accompanied by a letter written and signed by a third person, the letter itself being no part of the acknowledgment: *Ingram* v. *Little* (1883), C. & E. 186.

Supplementary parol evidence.

The written acknowledgment need not contain all the particulars necessary to establish the claim. Thus parol evidence can be given to show the date of the acknowledgment (*Edmunds* v. *Downes* (1834), 2 Cr. & M. 459); and where the writing refers to a debt, but does not sufficiently identify it, parol evidence is admissible to show what debt is referred to: *Spickernell* v. *Hotham* (1854), Kay, 669; *Bewley* v. *Power* (1833), Hayes & J. 368. It is admissible also to connect two documents which together make the acknowledgment: *McGuffie* v. *Burleigh* (1898), 78 L. T. 264; and, if the creditor is not named, to show to whom it was made. "Evidence may be given showing for or to whom the written acknowledgment was made, by delivery or otherwise": *Hartley* v. *Wharton* (1840), 11 A. & E. 934.

Evidence of amount of debt.

Moreover, if there is a written acknowledgment of a debt being due, the amount may be ascertained by other evidence. "It must be considered as fully established," said Alderson, B., in *Cheslyn* v. *Dalby* (1840), 4 Y. & C. Ex. p. 241, "that a general promise in writing to pay, not specifying any amount, but which can be made certain as to the amount by extrinsic evidence, is sufficient to take the case out of the operation of the Statute of Limitations": *Leehmere* v. *Fletcher* (1833), 1 Cr. & M. 623; *Bird* v. *Gammon* (1837), 3 Bing. N. C. 883; *Waller* v. *Lacy* (1840), 1 Scott N. R. p. 203; *Williams* v. *Griffith* (1849), 3 Ex. 335. Where, however, the acknowledgment specifies a sum as being the balance of a debt, it will be effectual only as to this sum: *Dabbs* v. *Humphries* (1834), 10 Bing. 446. And a receipt for £50 did not operate as an acknowledgment with respect to £100 previously mentioned in the same paper under a different date: *Robarts* v. *Robarts* (1828), 1 Moo. & P. 487. But an acknowledgment of a debt as "including" two sums of £100 and £40 was effectual also as to a sum due for costs: *Godwin* v. *Culley* (1859), 4 H. & N. 373.

Exemption from stamp duty.

An acknowledgment in writing, although it operates as an agreement, is not on that ground subject to stamp duty:—

"No memorandum or other writing made necessary by this Act shall be deemed to be an agreement within the meaning of any statute relating to duties of stamps." Statute of Frauds Amendment Act, 1828, s. 8.

The corresponding Irish enactment is the Irish C. L. P. A., 1853, s. 27.

The exemption only extends to documents which would operate as agreements and which are made necessary by the Act. If the document relied on as an acknowledgment has an independent operation which requires a stamp, it cannot be used unless it bears the appropriate stamp; as where it is a promissory note for the amount of the debt: *Parmiter* v. *Parmiter* (1860), 3 D. F. & J. 461; *James* v. *Ryder* (1838), 4 M. & W. 32. Formerly an unstamped document could be used for a purpose merely collateral to its real effect: *Matheson* v. *Ross* (1849), 2 H. L. C. 286; *Evans* v. *Prothero* (1852), 1 D. M. & G. 572; *Adams* v. *Morgan* (1882), 12 L. R. Ir. 1: *cf. Ashling* v. *Boon*, [1891] 1 Ch. 568. Thus it could be used for the purpose of identifying the debt in respect of which an acknowledgment had been given by a separate document: *Spickernell* v. *Hotham* (1854), Kay, 669. But sect. 14 (4) of the Stamp Act, 1891, under which an instrument cannot, except in criminal proceedings, be given in evidence or be available for any purpose whatever, unless it is duly stamped, appears to overrule these cases; and an unstamped instrument cannot be used to prove an acknowledgment, either directly or indirectly, if it has any operation, other than as an acknowledgment, which requires it to be stamped.

(iv.) *The Construction of the Acknowledgment.*

The question of the sufficiency of the acknowledgment, so far as it depends solely on the construction of a written document, is for the judge: *Doe* v. *Edmonds* (1840), 6 M. & W. p. 302; *Collis* v. *Stack* (1857), 1 H. & N. 605; *Furness* v. *Meek* (1857), 27 L. J. Ex. 34; though formerly a different rule prevailed: *Lloyd* v. *Maund* (1788), 2 T. R. 760; *cf. Bucket* v. *Church* (1840), 9 C. & P. 209. But if the document requires to be explained by other evidence it may perhaps be left to the jury: *Linsell* v. *Bonsor* (1835), 2 Bing. N. C. 241; *Morrell* v. *Frith* (1838), 3 M. & W. 402; *Routledge* v. *Ramsay* (1838), 8 A. & E. 221. Construction is for judge.

Promise implied from unqualified acknowledgment.

From an unqualified acknowledgment that a debt is due a promise to pay it will be implied. Thus where, in answer to a complaint that not even interest had been paid to the creditor on a sum of £100, the debtor replied: "The £100 she has been receiving double and treble for," this was held to be a sufficient acknowledgment: *Bucket* v. *Church* (1840), 9 C. & P. 209. The same result follows where the debtor enters the debt as due by him in a signed account: *Waller* v. *Lacy* (1840), 1 Scott N. R. 186; *Holmes* v. *Mackrell* (1858), 3 C. B. N. S. 789: *Nash* v. *Hill* (1858), 1. F. & F. 198—unless he claims that on the entire account a balance is due to himself: *Williams* v. *Griffith* (1849), 3 Ex. 335—or admits that it should be debited to him in account (*Evans* v. *Simon* (1853), 9 Ex. 282), or indorses his name with a fresh date on an old promissory note (*Bourdin* v. *Greenwood* (1871), 13 Eq. 281), or gives a bill of exchange for the amount of the debt (*Ex parte Wilson* (1841), 1 Mont. D. & De G. 586), or recites the debt in a deed which provides for the ascertainment of the amount by arbitration (*Cheslyn* v. *Dalby* (1840), 4 Y. & C. Ex. 238), or expressly assumes liability, as by writing, "I own myself answerable for this debt": *Spickernell* v. *Hotham* (1854), Kay, 669.

And it is sufficient that the debtor expresses his readiness to pay if it can be proved that any money is due (*Holmes* v. *Smith* (1858), 8 Ir. C. L. R. 424; *Leland* v. *Murphy* (1865), 16 Ir. Ch. Rep. 500), unless he intimates doubt as to the justice of the claim: *Spong* v. *Wright* (1842), 9 M. & W. 629.

Request by debtor for an account.

In general a debtor acknowledges the debt by asking for his account to be sent in. The natural inference is that he wants it for the purpose of settling it, and a promise to this effect is implied: *Quincey* v. *Sharpe* (1876), 1 Ex. D. 72. And similarly, where a request is made for particulars of "any unsettled bill of costs": *Curwen* v. *Milburn* (1889), 42 C. D. 424, C. A. The case is still stronger when the debtor, after requesting an account, suggests a plan by which to ascertain "clearly the position we hold to each other": *Burrows* v. *Baker* (1869), Ir. R. 3 Eq. 596; or asks for further explanation of an account received, saying it is his wish to settle it immediately: *Sidwell* v. *Mason* (1857), 2 H. & N. 306. This is an admission of the debt so far as correct, and a promise to pay it. Similarly, where a man writes to his solicitor and agent to oblige him with an account, that everything may be settled: *Rendell* v. *Carpenter*

(1828), 2 Y. & J. 484; or, in asking for an account with vouchers, says that he will examine it, and send a cheque for the amount due: *Skeet* v. *Lindsay* (1877), 2 Ex. D. 314. But a reference in a letter to a previous application for an account (by way of explanation and not of repeating the application) is not equivalent to a promise to settle: *Williams* v. *Griffith* (1849), 3 Ex. 335.

The request for the account must come from the debtor and be signed by him. The sending in of an account by the creditor, and the failure of the debtor to dissent, does not amount to an acknowledgment: *Re McHenry* (1894), 42 W. R. 491. And a mere expression by the debtor of readiness to go into an account is not sufficient, as this may be for the purpose of showing that there is nothing due: *Crawford* v. *Crawford* (1867), Ir. R. 2 Eq. 166.

Acknowledgment of pending account.

It is not necessary for the purpose of a suit for an account to have an acknowledgment that a debt, or any specified amount of a debt, is actually due; it is enough that there is an acknowledgment that an account is pending, and that the defendant promises to pay the balance, if any, due from him upon such account: *per* Wood, V.C., in *Prance* v. *Sympson* (1854), Kay, 678; *Langrish* v. *Watts*, [1903] 1 K. B. 636, C. A. And if there is an unqualified admission that there is a pending account between two parties which has to be examined, a promise may be inferred that the balance shall be paid: *Firth* v. *Slingsby* (1888), 58 L. T. 481; *Maniram* v. *Seth Rupchand* (1906), 22 T. L. R. 619, P. C.; *cf. Banner* v. *Berridge* (1881), 18 C. D. 254. Where the defendant wrote: "You and I must go into it and settle the account. . . . It is necessary we should settle this matter and put it on the square," there was a sufficient acknowledgment: *Prance* v. *Sympson*. But where A. and B. had an unsettled account together, and in 1845 A. signed the following memorandum: "It is agreed that B. in his general account shall give credit to A. for £174 for bricks delivered in 1834," this was not sufficient to keep alive B.'s right to an account against A.'s estate. The memorandum was an agreement to take a particular item into account as between the parties, but was silent as to how the account stood; and regarded as part payment, the payment was in 1834: *Hughes* v. *Paramore* (1855), 24 L. J. Ch. 681.

Request for time.

A request for time implies a promise to pay. "Let matters remain as they are for a short time, and all will be right," is an absolute acknowledgment: *Collis* v. *Stack* (1857), 1 H. & N.

605. A similar instance will be found in *Martin* v. *Geoghagan*, (1850), 13 Ir. L. R. 403. And in *Cornford* v. *Smithard* (1859), 5 H. & N. 13, "I must beg to trespass on your kindness a short time longer till a turn in trade takes place," was held to be an unconditional acknowledgment, and proof that a turn in trade had taken place was not necessary.

Circumstances excluding a promise to pay.

A written admission of a debt will not exclude the statute if it is accompanied by expressions which exclude the implication of a promise to pay it. "What I think," said Cotton, L.J., in *Green* v. *Humphreys* (1884), 26 C. D. 474, C. A., at p. 478, "we must find from the writing is not merely an acknowledgment of such a state of circumstances as will throw a duty upon the writer to pay, but words of such a character that you may reasonably infer from the words a promise to pay." In that case a statement that by a certain date the debt would have been paid was, under the circumstances, ineffectual to imply a promise. And it follows that a reference to a claim will not exclude the statute if it is accompanied by a denial of liability: *Brigstocke* v. *Smith* (1833), 1 Cr. & M. 483.

Similarly, the statute is not excluded where the debtor, while admitting the debt, intimates that he will not pay it: *A'Court* v. *Cross* (1825), 3 Bing. 329; *Linsell* v. *Bonsor* (1835), 2 Bing. 241; *Briggs* v. *Wilson* (1854), 5 D. M. & G. 12, see judgment of Turner, L.J.; or is unable to pay:—"If in funds I would immediately pay the money and take the bill out of your hands": *Richardson* v. *Barry* (1860), 29 Beav. 22; though a statement of inability to pay does not necessarily exclude a promise: *Green* v. *Humphries* (1884), 26 C. D. p. 479, C. A.; *Firth* v. *Slingsby* (1888), 58 L. T. 481; *Re Buskin* (1894), 15 R. 117. And there is no absolute acknowledgment where a debtor says that he must be left to settle his affairs without legal compulsion: *Fearn* v. *Lewis* (1830), 6 Bing. 349; *Cassidy* v. *Firman* (1867), Ir. R. 1 C. L. 8; *Mowbray* v. *Appleby* (1899), 80 L. T. 805; or if, while admitting the debt, he reserves the question of settlement: *Morrell* v. *Frith* (1838), 3 M. & W. 402. Apparently a letter written "without prejudice" cannot be relied on to take a case out of the statute: *Re River Steamship Co., Mitchell's Claim* (1871), 6 Ch. 822, at p. 831.

Debt not admitted.

An assertion that a debt has been paid is not turned into an acknowledgment by adding that, if not, "it is very fit it should be": *Poynder* v. *Bluck* (1837), 5 Dowl. 570. And where the

debtor professes ignorance of the debt, he does not acknowledge it by expressing annoyance that it is so long unsettled. This is in effect only a promise to examine into the account; not necessarily to pay it: *Collinson* v. *Margesson* (1858), 27 L. J. Ex. 305. An acknowledgment is not made conditional by the debtor claiming a set-off which fails: *Leland* v. *Murphy* (1865), 16 Ir. Ch. R. 500; but if the debtor alleges that the claim against him is subject to deductions which will wipe it out, there is no acknowledgment: *Re Mitchell's Claim* (1871), 6 Ch. 822. An acknowledgment in a letter written without prejudice to the debtor's "rights now, or in any future arrangement that may be made or instituted" is not sufficient: *Cory* v. *Bretton* (1830), 4 C. & P. 462.

Personal promise excluded.

No personal promise to pay is implied when the debtor merely charges certain property with payment of the debt: *Martin* v. *Knowles* (1833), 1 Nev. & Man. 421; or directs the creditor to collect specified debts and pay himself out of them: *Routledge* v. *Ramsay* (1838), 8 A. & E. 221; or refers the creditor for payment to a third party who has money of the debtor in hand: *Whippy* v. *Hillary* (1832), 3 B. & Ad. 399; or offers to allow the creditor to take certain goods in discharge of the debt: *Cawley* v. *Furnell* (1851), 20 L. J. C. P. 197; or only offers payment in a particular way, as by set-off (*Cripps* v. *Davis* (1843), 12 M. & W. 159), or out of a particular fund: *Re Littles* (1847), 10 Ir. Eq. R. 275; *Courtenay* v. *Williams* (1844), 3 Hare, p. 550. But the mere indication of a particular source, as a good harvest, out of which the debtor hopes to pay is not sufficient to restrict the acknowledgment: *Bird* v. *Gammon* (1837), 3 Bing. N. C. 883.

Admission for purpose other than acknowledgment.

A promise will not be implied where the admission of the debt is obviously made for some other purpose; as where a surety assents to a creditor receiving dividends under a deed of assignment by the principal debtor: *Cockrill* v. *Sparkes* (1863), 1 H. & C. 699; or the executrix of the debtor admits the debt in proceedings for administration: *Re Wolmershausen* (1890), 62 L. T. 541.

Admission in bankruptcy.

And an admission of a debt made in the course of bankruptcy proceedings does not take the debt out of the statute. The circumstances are such as to prevent the implication of a promise to pay. Usually the admission is compulsory; but apart from this, it is not made with any view of paying the full

debt: *Courtenay* v. *Williams* (1844), 3 Hare, p. 550; *Everett* v. *Robertson* (1858), 1 E. & E. 16; *Re Clendinning* (1859), 9 Ir. Ch. R. 284; *Ex parte Topping* (1865), 4 D. J. & S. p. 562; see *Pott* v. *Clegg* (1847), 16 M. & W. 321. Moreover, after the bankruptcy the bankrupt cannot effectually bind his estate: *Smallcombe* v. *Bruges* (1824), M'Cl. 45; though he can, on the eve of bankruptcy, revive a debt by acknowledgment with a view to giving the creditor a right to claim in the bankruptcy: *Re Lane* (1889), 23 Q. B. D. 74.

Mere wish to pay.

Sometimes a promise has been implied where the debtor merely expresses a wish to pay the debt: *Gardner* v. *M'Mahon* (1842), 3 Q. B. 561; "Your account is quite correct, and O! that I were going to enclose the amount": *Dodson* v. *Mackey* (1838), 8 A. & E. 225 n.; or hopes that everything will be arranged: *Edmunds* v. *Goater* (1852), 15 Beav. 415; or says that he will try to pay a little at a time: *Lee* v. *Wilmot* (1866), L. R. 1 Ex. 364; or that he is expecting money without fail in a month, and will then try to settle: *Pryke* v. *Hill* (1899), 79 L. T. 738: *Whitcombe* v. *Steere* (1903), 19 T. L. R. 697. But too much reliance must not be placed on these cases, and in general the expression of a hope that the debt will be paid is not a promise to pay it: *Hart* v. *Prendergast* (1845), 14 M. & W. 741; *Smith* v. *Thorne* (1852), 18 Q. B. 134; *Rackham* v. *Marriott* (1857), 2 H. & N. 196; *Jupp* v. *Powell* (1884), C. & E. 349.

Express promise to pay.

An express promise to pay of course excludes the statute; an undertaking, for instance, to pay costs found due on taxation: *Archer* v. *Leonard* (1863), 15 Ir. Ch. R. 267; or a promise to pay a certain proportion of a joint debt, extrinsic evidence being admissible as to the amount: *Leckmere* v. *Fletcher* (1833), 1 Cr. & M. 623. A promise to pay as soon as the debtor's affairs are arranged has been held to be a promise to pay after a reasonable time: *Chasemore* v. *Turner* (1875), L. R. 10 Q. B. 500; and a promise that a debt "shall be liquidated at the earliest opportunity possible," accompanying expressions of present inability to pay, was a sufficient acknowledgment: *Wilby* v. *Elgee* (1875), L. R. 10 C. P. 497. But where an offer by the debtor to pay in a particular manner is rejected by the creditor, the statute is not excluded: *Buckmaster* v. *Russell* (1861), 10 C. B. N. S. 745; see *Francis* v. *Hawkesley* (1859), 1 E. & E. 1052. And an express promise is of no service if a contemporary document shows that it is not intended to be

acted on, as where the creditor at once gives a discharge, though in an invalid form: *Goate* v. *Goate* (1856), 1 H. & N. 29.

Promise conditional on ability to pay.

Sometimes express promises to pay are coupled with a condition, and then they do not operate to revive the debt unless evidence is given of the fulfilment of the condition. Thus where the acknowledgment ran, "I cannot pay the debt at present, but I will pay it as soon as I can," no action lay on this new promise without proof of ability to pay: *Scales* v. *Jacob* (1826), 3 Bing. 638; *Tanner* v. *Smart* (1827), 6 B. & C. 603; *Gould* v. *Shirley* (1829), 2 Moo. & P. 581; *Haydon* v. *Williams* (1830), 7 Bing. 163; *Re Bethell* (1887), 34 C. D. 561; *Lusher* v. *Hassard* (1904), 20 T. L. R. 563, C. A. In *Edmunds* v. *Downes* (1834), 2 Cr. & M. 459, the debtor would be happy to pay "as soon as convenient"; in *Hodgens* v. *Graham* (1831), Alc. & Nap. 49, the debtors were waiting for a remittance: "When it comes we shall send you the amount of the bill [of exchange]." These promises were conditional, and evidence was required of ability. In *Hammond* v. *Smith* (1864), 33 Beav. 452, where the acknowledgment was, "I will pay you as soon as I get it in my power," evidence of ability was given, and the statute was excluded. But a mere reference to present inability does not make the promise conditional, as where a tenant wrote, "If I were able in any way to reduce [the debt] further, be quite sure I should do so": *Re Buskin* (1894), 15 R. 117.

Promise to pay on receipt of specified funds.

Similarly, where the debt was to be paid when certain mortgage money due to the debtor was received, the statute ran against this new promise from the date of receipt, and not before: *Maunsell* v. *Hedges* (1851), 2 Ir. C. L. R. 88. The receipt was more than six years after the promise. In *Langrish* v. *Watts*, [1903] 1 K. B. 636, C. A., the promise was to pay when there was a further division of an estate in which the debtor was interested, and the promise was absolute upon this division being made. In *Duke of Buccleugh* v. *Eden* (1889), 61 L. T. 360, the debtor undertook, if the creditor's executors required it, to repay a loan on the sale of certain property. The property had been sold within six years of action, and the promise being thus made absolute, the statute was excluded. In *Barrett & Sons, Ltd.* v. *Davies* (1904), 91 L. T. 736, also, there was a promise to pay if a sale of property was effected; but there was no sale, and hence the promise did not save the debt.

In *Meyerhoff* v. *Frochlich* (1878), 4 C. P. D. 63, C. A., the debtor

Other conditional promises.

wrote: "I shall be glad, as soon as my position becomes somewhat better, to begin again and continue with my instalments." There was no proof that his position had substantially improved, and the case was not taken out of the statute. Where a surety promises to make up the principal debtor's deficiency, there is, perhaps, no absolute promise until the deficiency is ascertained: *Humphreys* v. *Jones* (1845), 14 M. & W. 1; but, assuming such a promise to be conditional, it is not necessary to sue the principal debtor in order to turn it into an absolute promise. It becomes absolute when application has been made to the debtor without result: S. C. Where the surety, on being applied to, asked that means should first be used to compel his principal to pay, this was a promise to pay if the principal did not: *Fisk* v. *Mitchell* (1871), 24 L. T. 272.

Promise conditional on arbitration.

Where the promise was to pay the amount found due by an award, and there was no award, this was not an unqualified acknowledgment. The award might have found nothing due: *Hales* v. *Stevenson* (1863), 8 L. T. 798; *Fenner* v. *Lord* (1898), 14 T. L. R. 450. So an expression of readiness to have questions settled by arbitration is at most a conditional promise to pay on arbitration, and if, through the creditor's fault, no arbitration is held, the condition is not satisfied: *Mitchell's Claim* (1871), 6 Ch. 822. But in *Cheslyn* v. *Dalby* (1840), 4 Y. & C. Ex. 238, where no arbitration took place, parol evidence of the amount due was allowed.

(v.) *When the Acknowledgment may be given.*

When acknowledgment may be given.

Inasmuch as the promise contained in the acknowledgment furnishes the new cause of action, it is essential that the acknowledgment shall have been given before the action is commenced: *Bateman* v. *Pinder* (1842), 3 Q. B. 574. But it is not necessary that it shall have been given within six years of the original cause of action. The statute does not extinguish the debt, and hence the debt forms a good consideration for the new promise, notwithstanding that the statutory period has run: see *Willins* v. *Smith* (1854), 4 E. & B. p. 185; *Spickernell* v. *Hotham* (1854), Kay, 669; though it is easier to construe an acknowledgment as an unconditional promise when it is given before the statute has run, than when it is given afterwards: *Cornforth* v. *Smithard* (1859), 5 H. & N. 13, *per* Pollock, C.B., and see S. C., 29 L. J. Ex. 228.

(vi.) *Effect of the Acknowledgment.*

Acknowledgment by co-contractor or co-executor. Former law.

Since the acknowledgment operates as an implied promise it is effectual to keep the debt alive only as against the person by whom or on whose behalf it is made. Formerly in a case of continuing contract in which several contractors were bound, whether jointly or severally, each was deemed to be the agent of the rest for making an admission of the debt, and consequently an acknowledgment by one saved the statute as regards all: *Whitcomb* v. *Whiting* (1781), Dougl. 652; *Perham* v. *Raynal* (1824), 2 Bing. 306. But the death of one co-contractor severed the contract, and his estate was not liable to be affected by an acknowledgment given by the survivor: *Atkins* v. *Tredgold* (1823), 2 B. & C. 23; *Ault* v. *Goodrich* (1828), 4 Russ. p. 434; nor, on the other hand, would an acknowledgment by the executor affect the survivor: *Slater* v. *Lawson* (1830), 1 B. & Ad. 396.

With respect to co-executors of a deceased sole contractor, the better opinion seems to have been that the acknowledgment of one was not effectual to raise a promise as against another: *Tullock* v. *Dunn* (1826), Ry. & Moo. 416; see *Scholey* v. *Walton* (1844), 12 M. & W. 510; and since the creditor was bound to sue all the executors jointly, the acknowledgment of one did not assist him; see *Re Macdonald*, [1897], 2 Ch. 181, p. 187.

Present law.

But the law was put on a new footing, both for the case of co-contractors and of the co-executors of a sole contractor, by Lord Tenterden's Act (9 Geo. 4, c. 14), sect. 1 of which enacts as follows:—

Statute of Frauds Amendment Act, 1828, s. 1.

"Where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator shall lose the benefits of the said enactments [*i.e.* the Limitation Act, 1623, and the corresponding Irish Act, 10 Car. 1, sess. 2, c. 9], or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them.

[*Proviso preserving the effect of part payment; infra*, p. 379.]

"Provided also that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited Acts, or this Act, as to one or more of such joint contractors, or executors or administrators,

shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

The Act 10 Car. 1, sess. 2, c. 9, was repealed by the Ir. C. L. P. A., 1853, and s. 24 of that statute now provides to the above effect for Ireland.

Effect of statute.

The effect of these enactments as regards co-contractors is to enable an action to be brought against the one who gives the acknowledgment, and, although the liability is joint, the action will not be defeated by the non-joinder of another co-contractor in whose favour the statute has run; while, on the other hand, the acknowledgment is not effectual against such other co-contractor, and should he have been joined, judgment will be given in his favour. As regards co-executors, while the acknowledgment of one will not bind the others so as to involve them in any personal liability, yet it will bind the estate; and after the death of the executor who has given the acknowledgment, the liability which has thus been kept alive can still be enforced against the estate: *Re Macdonald*, [1897] 2 Ch. 181. An acknowledgment by one partner will bind the other on the ground of agency, but it should be clear and distinct: *Holme* v. *Green* (1816), 1 Stark. 488; *infra*, 382.

II. PART PAYMENT.

General Principles.

Claims saved by part payment.

When the statute is running (1) against a mortgagee, (2) against a right to recover a sum of money charged on land or secured by judgment, or a legacy, (3) against the right to recover a sum of money due under a specialty or (4) under a simple contract, it may be checked by payment made on account either of principal or interest.

(1) Claim by mortgagee to land.

Under the R. P. L. A., 1837, as modified by sect. 9 of the R. P. L. A., 1874, the mortgagee may enter or bring an action at any time within twelve years "after the last payment of any part of the principal money or interest" secured by the mortgage: *supra*, p. 85.

(2) Claim to money charged on land, etc.

Under sect. 8 of the R. P. L. A., 1874, twelve years is a bar to proceedings to recover any sum of money secured by mortgage or judgment, or otherwise charged upon land, or any legacy, "unless in the mean time some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable or his agent, to the person entitled thereto or his agent": *supra*, p. 323. These words replace the same words in sect. 40 of the Act of 1833. There is a corresponding provision with reference to shares of intestates' estates in the Law of Property Amendment Act of 1860, sect. 13: *supra*, p. 169. The payment may be made after the twelve years have run: *supra*, p. 336; *Beamish* v. *Whitney*, [1908] 1 I. R. 38.

(3) Specialty debts.

Under the Civil Procedure Act, 1833, sect. 5, the twenty years' limit on actions to recover specialty debts runs afresh "if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such . . . specialty . . . or his agent, or by part payment or part satisfaction on account of any principal or interest being due thereon": *supra*, p. 324.

(4) Simple contract debts.

There is no statutory provision regulating the effect of payment upon simple contract debts, and payment only saves the debt when it is such that a promise to pay the debt can be implied.

(5) Personal remedies for money charged on land.

(*a*) Claim under covenant in mortgage.

An action against a mortgagor on the covenant for payment contained in the mortgage deed is subject, not to the twenty years' limit of the Civil Procedure Act, 1833, but to the twelve years' limit under sect. 8 of the Act of 1874, since it is an action to recover money secured by mortgage: *Re Sutton* (1882), 22 C. D. 511, C. A.; and it is the same where the action is on a collateral bond given by the mortgagor: *Fearnside* v. *Flint* (1883), 22 C. D. 579. As against the mortgagor, therefore, the effect of payment depends on sect. 8 of the Act of 1874, whether the proceedings are against the land or against himself personally.

(*b*) Claim against surety for mortgagor.

But where a surety has joined in the covenant in the mortgage deed, an action against the surety appears to be subject not to sect. 8 of the Act of 1874, but to the Civil Procedure Act of 1833 (Kay, J., and Bowen, L.J., in *Re Frisby* (1889), 43 C. D. 106, and Stirling, J., in *Re Wolmershausen*,

(1890), 62 L. T. 541; *contra*, Cotton, L.J., in *Re Frisby*), and it has been decided that this is so where the surety has made himself liable on a collateral bond, since an action against him is not to recover the money charged on the land, but damages for non-payment of that money: *Re Powers* (1885), 30 C. D. 291, C. A.

(*c*) Simple contract debt charged on land.

Where the mortgagor is liable only for a simple contract debt, the six years' limit under the Limitation Act, 1623, applies, and the period for enforcing the personal liability is not extended to twelve years under sect. 8 of the Act of 1874, notwithstanding that the money is secured by mortgage: *Barnes* v. *Glenton*, [1899] 1 Q. B. 885, C. A.

Effect of the statutes.

Thus the R. P. L. A., 1837, governs the effect of payment when a mortgagee brings an action to recover possession or to foreclose; sect. 8 of the R. P. L. A., 1874, when an action is brought to recover money out of land, or to recover against the mortgagor on his covenant the money secured by the mortgage or to recover a judgment debt, or a legacy; sect. 5 of the Civil Procedure Act, 1833, when an action is brought on a covenant to secure money not charged on land, and (probably) where it is brought on a covenant by a surety, even though the money is charged on land; and the doctrine of implied promise applies to all personal actions brought on simple contract debts, whether the money is also secured on land or no.

Annuity.

Where an annuity is created by will and not charged on land, and regular payments are made, but not of an amount sufficient to meet the instalments in full, it has been held that they operate as payments of so many parts of the principal money constituting the annuity so as to keep alive the right to recover the entire arrears: *Re Ashwell's Will* (1859), Johns. 112. But it seems more correct to regard each payment as made in respect of the instalment then due, so that the arrears recoverable would be limited to twelve years: *cf. supra*, p. 168.

Payment must be an admission of right.

Although a payment taking effect under the statutes need not be such as to imply a promise to pay, yet it is a principle applicable to part payment under all Statutes of Limitation that it must be made as an admission of right: *per* Jessel, M.R., in *Harlock* v. *Ashberry* (1882), 19 C. D. 539; that is, of a right in the recipient to the balance of the debt. Consequently it must have been made as a payment on account, and must not purport to be in satisfaction of the entire demand: *Taylor* v. *Hollard*,

[1902] 1 K. B. 676. And it must be made in respect of the debt sued on: *Ashlin* v. *Lee* (1875), 44 L. J. Ch. 376, C. A.

Where assets of an intestate fall in more than twenty years after his death, a payment by the administrator out of them is not an admission of liability in respect of the general estate, as to which the statute has then run, so as to revive the right of the next-of-kin to bring an action for administration of such estate: *Re Johnson* (1885), 29 C. D. 964, p. 974.

Compulsory payment.

In *Taylor* v. *Hollard* (*supra*), it seems to have been considered that no admission could be implied from a payment which was not voluntary or from a payment by a trustee in bankruptcy. But while this is so in the case of simple contract debts, since the payment is useless as an admission unless it implies a promise to pay the balance of the debt (*cf. Davies* v. *Edwards* (1851), 7 Ex. 22, *infra*, p. 377), no such promise is required for an admission of a specialty debt; and it is no objection to such an admission that it is made in bankruptcy, or by execution levied on a judgment (*Brew* v. *Brew*, [1899] 2 I. R. 163), or by a receiver whose position constitutes him the agent of the debtor, so that it is not the voluntary act of the debtor: *Cronin* v. *Dennehy* (1869), Ir. R. 3 C. L. 289, decided on the C. L. P. (Ir.) A., 1853, s. 23, the Irish enactment corresponding to 3 & 4 Will. 4, c. 42, s. 5; *cf. Vincent* v. *Willington* (1842), Long. & T. 456.

As in the case of acknowledgment, it will be convenient to deal separately with the effect of payment as regards (1) mortgages and specialty debts, and (2) simple contract debts.

(1) *Mortgages and Specialty Debts.*

(i.) *By whom Payment may be made.*

Payment must be by person liable or interested.

The R. P. L. A., 1837, speaks of payment simply, without in any way specifying by whom it may be made. On sect. 8 of the R. P. L. A., 1874 (replacing sect. 40 of the R. P. L. A., 1833), it is not clear whether the words "by the person by whom the same shall be payable or his agent" apply only to acknowledgment or also to payment. In *Chinnery* v. *Evans* (1864), 11 H. L. C. p. 134, Lord Westbury, C., thought that they applied to both cases, but the natural construction is that they apply to

acknowledgments only: see *Harlock* v. *Ashberry* (1882), 19 C. D. 539, C. A.; *Homan* v. *Andrews* (1850), 1 Ir. Ch. R. p. 112. In sect. 5 of the Civil Procedure Act, 1833, it is clear that payment is not qualified by the words "by the party liable." Hence in none of the three statutes is the person by whom the payment is to be made expressly defined, though it has been suggested that the Civil Procedure Act, 1833, impliedly requires that the payment shall be by the person liable or his agent: *Forsyth* v. *Bristowe* (1853), 8 Ex. 716; *Roddam* v. *Morley* (1857), 1 De G. & J. p. 6; *Dibb* v. *Walker*, [1893] 2 Ch. 429. The last-mentioned statute in terms requires, however, that the part payment shall be an acknowledgment (*Whitley* v. *Lowe* (1858), De G. & J. p. 712), and it is a principle applicable to all Statutes of Limitation, that the payment must be by a person liable as an acknowledgment of right (*Harlock* v. *Ashberry* (*supra*), *per* Jessel, M.R.), or at any rate by a person interested to pay: *per* Lord Cranworth, C., in *Roddam* v. *Morley* (1858), 1 De G. & J. p. 18.

Payment by agent.

The payment can, of course, be made by the person primarily liable on the mortgage or specialty contract—or by his personal representative: *Thompson* v. *Hurley*, [1905] 1 I. R. 588—and, either by implication from the words of the statutes, or upon the general doctrine of agency, it can be made by his agent. But where a mortgagee relies upon payment by an agent of the mortgagor, it is necessary to ascertain that the agency is in fact continuing. In *Newbould* v. *Smith* (1886), 33 C. D. 127, C. A., the mortgagor's solicitor paid interest to the mortgagee on a mortgage created in 1863. This he did as the mortgagor's agent till 1866, but his agency was not shown to have continued after that year, and his subsequent payments were, therefore, ineffectual to keep the mortgage alive. A *cestui que trust* may be, for the purpose of making a part payment, the agent of the trustee: *Vincent* v. *Willington* (1842), Long. & T. 456; and a doweress is the agent of the heir of the mortgagor, if she is in possession of the whole of the mortgaged estate with his consent: *Ames* v. *Mainwaring* (1859), 26 Beav. 583.

Payment by receiver.

A receiver appointed by the Court (*Chinnery* v. *Evans* (1864), 11 H. L. C. p. 134), or by a mortgagee under the power conferred upon him by the mortgage deed or by statute (*Re Hale*, [1899] 2 Ch. 107, C. A.), is treated as the agent of the person liable to pay, and payment by him is effectual, provided, in the case of a receiver appointed by the Court, that the payment is authorized

by the Court: *Whitley* v. *Lowe* (1858), 25 Beav. 421; 2 De G. & J. 704. And so, too, as to a payment made to a judgment creditor under an order of the Landed Estates Court in the presence of the debtor: *Cronin* v. *Dennehy* (1869), Ir. R. 3 C. L. 289; see *Re Irwin's Estate*, [1907] 1 I. R. 357.

Assignee of equity of redemption.

An assignee of an equity of redemption, who has covenanted with the mortgagor to pay the mortgage debt, becomes his agent to pay the interest, so that a payment by the assignee is effectual to keep alive the debt: *Forsyth* v. *Bristowe* (1853), 8 Ex. 716; and the same result would follow in the case of a sale of the equity of redemption, even without express covenant, since the purchaser is under an implied obligation to indemnify the vendor: *Waring* v. *Ward* (1802), 7 Ves. 332; *Bridgman* v. *Daw* (1891), 40 W. R. 253. Similarly, an assignee who, subsequently to the assignment and with the privity of the mortgagor's representative, undertakes liability to the mortgagee, can make a payment which will be effectual as an acknowledgment: *Dibb* v. *Walker*, [1893] 2 Ch. 429.

Person in possession of land.

But where some person other than the debtor is in possession of land which is subject to the debt it seems to be unnecessary to rely upon the doctrine of agency. If the debt is a direct charge on the land, the person in possession is liable to lose the land if the mortgage debt or interest is not paid, and he is consequently a person interested to make the payment; and equally so if the debt is not a direct charge on the land, but is recoverable out of the land in an administration action. Consequently it may be said generally that a payment by an assignee of the mortgagor, or by a devisee of the mortgagor or of a specialty debtor, is a payment by a person interested, and as such is effectual to keep alive the appropriate remedy whether the payment is referred to the R. P. L. A., 1837, to sect. 8 of the R. P. L. A., 1874, or to sect. 5 of the Civil Procedure Act, 1833: see *Roddam* v. *Morley* (1857), 1 De G. & J. p. 18; *Coope* v. *Cresswell* (1866), 2 Ch. p. 124; *Pears* v. *Laing* (1871), 12 Eq. p. 54. And the same consideration would render effectual a payment by a person who was in possession without title. It is a different question whether the payment is effectual only against the land or against the mortgagor and his estate generally, and this will be dealt with subsequently: *infra*, p. 368.

Payment by a person

And a person who is neither the agent of the original debtor, nor is interested as being in possession of land liable to the

entitled to pay.

debt, may nevertheless make an effectual payment under the statutes, (1) if, by the terms of the mortgage contract, he is entitled to make the payment, or (2) if, as between himself and the mortgagor, he is bound to make it. The former case occurred in *Lewin* v. *Wilson* (1886), 11 App. Cas. 639. Under a mortgage by W., who as between himself and H. was a surety, but as regarded the mortgagee was a principal debtor, provision was made for redemption on payment either by W. or H. H. and W. were also liable for the mortgage debt on a joint and several bond. In construing a Canadian statute corresponding to the R. P. L. A., 1837, it was said that a payment was sufficient if "made by a person who under the terms of the contract is entitled to make a tender, and from whom the mortgagee is bound to accept a tender of money for the defeasance or redemption of the mortgage." Accordingly a payment by H. was effectual to keep up the mortgage on the property of W. And the second case occurred in *Bradshaw* v. *Widrington*, [1902] 2 Ch. 430, C. A. There J. E. B. mortgaged his land to secure an advance for the benefit of W. B., his son, to whom he at once paid over the money, taking W. B.'s bond for the amount, with interest at the rate secured by the mortgage. It was held that payments of interest made by W. B. to the mortgagee were as effectual as if made by J. E. B. "Whether," said Collins, M.R., "the person who makes the payment does so under an obligation imposed on him by law as a legal agent without [the mortgagor's], assent, or whether he is appointed under some arrangement with the mortgagor, so long as he pays with the assent, express or implied, of the mortgagor, the payment, as it seems to me, will keep alive the liability of the mortgagor, being in point of law an admission by him of the subsistence of the security."

Summary.

It appears, then, that under each of the statutes the payment may be made by any person who is liable, or interested, or entitled to pay, or who is in such a relation to the debtor that a payment by him operates as an admission by the debtor.

Payment by mere stranger not effectual.

On the other hand, payment by a mere stranger is not sufficient; *Chinnery* v. *Evans* (1864), 11 H. L. C. p. 133; *Homan* v. *Andrews* (1850), 1 Ir. Ch. R. 106, p. 112; *Re Clifden*, [1900] 1 Ch. 774. And although, if a tenant pays his rent to the mortgagee, such rent will in effect go in satisfaction of the principal or interest of the mortgage debt, yet the tenant is a stranger to the mortgage contract, and his payment does not

check the statute: *Harlock* v. *Ashberry* (1882), 19 C. D. 539, C. A.; *cf. Cockburn* v. *Edwards* (1881), 18 C. D. p. 457, C. A.

(ii.) *Mode and Proof of Payment.*

Constructive payment.

Where the tenant for life of land is himself the owner of a charge upon it, since it is his duty to keep down the interest, he is deemed to pay himself out of the rents and profits, and this is a sufficient payment to save the bar of the statute: *Burrell* v. *Earl of Egremont* (1843), 7 Beav. 205; *cf. Kirkwood* v. *Lloyd* (1849), 12 Ir. Eq. R. 585; *Carbery* v. *Preston* (1850), 13 Ir. Eq. R. 455; *Burrowes* v. *Gore* (1858), 6 H. L. C. p. 963; *Re Keaye* (1869), Ir. R. 3 Eq. 659.

And the principle applies whenever the same person is beneficially entitled for the time being to the land and the charge, although the legal right to receive the interest and the legal liability to pay may be vested in different persons as trustees: *Topham* v. *Booth* (1887), 35 C. D. 607. And so too where a husband is liable to pay and his wife is entitled to receive the interest, and the two are living together in amity: *Re Hawes* (1892), 41 W. R. 173. Where the husband, being so liable, has died, and his widow is his personal representative and is entitled to the interest for her life, the statute does not begin to run in favour of the husband's estate till her death: *Mills* v. *Borthwick* (1865), 35 L. J. Ch. 31. But where the owner of the charge is owner of only a share in the land, the principle of constructive payment does not keep alive the charge against the other shares: *Re Finegan's Estate*, [1906] 1 I. R. 370.

Existing charge.

Reliance can be placed on constructive payments only where there is an existing charge on the land. The doctrine does not apply to a case where a charge has been paid off out of other property so as to create as against the land a right of contribution. Thus where two devised estates, X and Y, were subject to a common mortgage, and the mortgage was wholly satisfied out of the proceeds of Y, the fact that the same person was tenant for life of X, and also of the residue of the proceeds of sale of Y, did not operate as a constructive payment on account of the liability of X to contribute to the mortgage so as to preserve such liability: *Re Allen*, [1898] 2 Ch. 499.

Re Allen.

Legal liability.

And in order that a constructive payment of interest, arising from the identity of the hand to receive and the hand to pay,

should have the full effect of an actual payment it is necessary that the person in possession of the land subject to the charge should be under a direct legal liability to pay the interest. In the absence of such liability the constructive payment will only keep the charge alive against the land; it will not keep it alive for other purposes. A settlor covenanted to pay a sum of money and charged it on land. He devised the land in fee to A., who was also tenant for life of the money secured by the covenant and charge. A. being thus in receipt of the income of the land and entitled to the interest of the charge, there was a constructive payment of the interest; but, inasmuch as he was under no liability to pay, the effect was confined to the land; the constructive payment did not keep alive the remedy on the covenant against the testator's personal estate: *Re England*, [1895] 2 Ch. 820, C. A.

Re England.

Covenant in settlement.

Where a settlement contains a covenant to pay money, and the covenantor is entitled to the income for life, since there is the same hand to pay and to receive interest, the statute does not run: *Re Dixon* (1892), 48 W. R. 665, C. A. But where the covenant is for the transfer of stock in which the covenantor is to have a life interest, and the transfer is not made, since there is no fund in existence capable of producing income, it will not be assumed that the covenantor has been paying himself, and the statute runs against the action on the covenant: *Spickernell* v. *Hotham* (1854), Kay, 669.

Receipt of part of security.

When a mortgagee receives money which represents part of his security, this in general operates as part payment so as to keep alive the debt; as where he is in receipt of an annuity which constitutes a security for the mortgage debt or part of it: *Staley* v. *Barrett* (1856), 26 L. J. Ch. 321; or where part of the mortgage money is paid out of funds in Court representing the mortgaged land: *Re Irwin's Estate*, [1907] 1 I. R. 357; or where he receives policy moneys which form part of the security, and applies them in reduction of the debt: *Re Conlan's Estate* (1892), 29 L. R. Ir. 199. But that such receipts may operate as payments by or on account of the mortgagor, they must be made with his concurrence or in proceedings to which he is a party; otherwise they will operate only as payments by a stranger, and will not keep the debt alive: *Re Clifden*, [1900] 1 Ch. 774. And there must be an actual receipt. The principle does not apply in regard to bonuses which the mortgagee elects to have

added to the policy instead of receiving them in cash: *Re Greene's Estate* (1884), 13 L. R. Ir. 461, p. 468, C. A.

Proof of payment.

The prohibition against proving payment by indorsement on an instrument, contained in sect. 3 of the Statute of Frauds Amendment Act, 1828 (*infra*, p. 379), does not apply to the Civil Procedure Act, 1833, sect. 40; and hence payment of interest on a bond debt can be proved after the obligee's death by an indorsement on the bond, provided the date is established, and that such date is prior to the expiration of the statutory period: *Searle* v. *Barrington* (1729), 2 Str. 826, 3 Bro. P. C. 593; *Turner* v. *Crisp* (1740), 2 Str. 827; *Briggs* v. *Wilson* (1854), 5 D. M. & G. 12; Roscoe's Nisi Prius Evidence, 18th ed. p. 37. And an indorsement on the bond of the name of a *cestui que trust* can be used to connect payments to the *cestui que trust* with payments of interest on the bond: *Gleadow* v. *Atkin* (1833), 1 Cr. & M. 410. If the accounts of the creditor or his agent show entries to the credit of the debtor these can be connected with the particular debt by contemporaneous letters of the debtor: *Vincent* v. *Willington* (1842), Long. & T. 456.

(iii.) *To whom Payment may be made.*

Payment must be to creditor or his agent.

Although the statutes referred to above (*supra*, p. 354) do not specify the person to whom payment in respect of a mortgage or a specialty debt must be made (*cf. Forsyth* v. *Bristow* (1853), 8 Ex. 716)—unless in sect. 8 of the R. P. L. A., 1874, the words "to the person entitled thereto or his agent" refer to payment—yet it seems that there is no admission of right so as to make the payment effectual unless it is made to the creditor or other person entitled to receive the money or his agent: *Barclay* v. *Owen* (1889), 60 L. T. 220. In the case just mentioned it was held that an administrator, who was also one of the next-of-kin, was entitled to receive payments in respect of a mortgage debt due to the intestate which he had appropriated to himself as his share, and the mortgage was consequently kept alive. Where the mortgage debt is settled, a payment of interest by the mortgagor to the tenant for life is in point of law a payment by him to the trustees pursuant to his covenant, and a payment by them to the tenant for life pursuant to the trusts of the settlement: *Re Somerset*, [1894] 1 Ch. p. 264, C. A.

Where, in accordance with the terms of a creditors' deed,

payments are made on behalf of the debtor to maintain policies which on the debtor's death are to be applied in discharge of his debts, these are in effect payments to the creditors on account of principal and interest, and they keep alive the remedies of judgment creditors: *Scott* v. *Synge* (1891), 27 L. R. Ir. 560, C. A. And payments made by arrangement to a creditor of the mortgagee are sufficient: *Jones* v. *Rhind* (1869), 17 W. R. 1091.

(iv.) *The Effect of Payment.*

Effect of payment not restricted to person making it.

It remains to consider to what extent a payment made by a person entitled to make it to a person entitled to receive it is effectual; whether it operates only as regards the person making it, or also as regards other persons who are liable directly or indirectly for the debt. Inasmuch as part payment is an admission of right, it has sometimes been held that it is effectual only as against the person making it, or, if he is a limited owner, or pays in a representative capacity, as against the estate which he represents. The leading authorities for this view are *Fordham* v. *Wallis* (1852), 10 Hare, 217, p. 228; *Dickenson* v. *Teasdale* (1862), 1 D. J. & S. 52; and *Coope* v. *Cresswell* (1866), 2 Ch. 112. But part payment is more than a mere admission of right; it operates for the benefit of all persons against whom the liability can be enforced, and partly for this reason, and partly upon more technical grounds, the view has prevailed that, subject to the special provision of sect. 14 of the Merc. Law Amend. Act, 1856, it preserves the creditor's right of action against all such persons: *Roddam* v. *Morley* (1857), 1 De G. & J. 1; *Re Lacey*, [1907] 1 Ch. 330, C. A.

Distinction between acknowledgment and payment.

The effect of an acknowledgment, it has been seen, is more restricted (*supra*, p. 336), and in general it affects only the person giving it. It was observed in *Lewin* v. *Wilson* (1886), 11 App. Cas. p. 645, that the difference corresponds to a practical distinction between acknowledgment and payment:—"As regards the person making them, acknowledgment may, as pointed out in *Bolding* v. *Lane* (1863), 1 D. J. & S. 122, be made by a person who, though a party to the mortgage contract, has ceased to have any substantial interest in it, and has nothing to lose by the acknowledgment; whereas payment is certain to be made only by those who have some duty or interest to pay. As regards the recipient, so long as he is paid according to the intention of the contracting parties,

he is in full enjoyment of his bargain, and is not put upon any further assertion of his rights; but not so if he only receives acknowledgment."

Effect of payment the same under all the statutes.

The foregoing remarks apply to payment under the R. P. L. A., 1837, under sect. 8 of the R. P. L. A., 1874, and under sect. 5 of the Civil Procedure Act, 1833; that is, to payments in respect of mortgages, in respect of money charged on land, legacies, and judgments, and in respect of specialty debts. The effect of payment in respect of a simple contract debt depends, not upon statutory provisions, but upon the doctrine of implied promise, and is governed, therefore, by different considerations. But the statutory provisions, although varying slightly in their language (*supra*, p. 354), are all subject to the same rule: the payment, if so made as to be effectual at all, is effectual to keep alive the creditor's remedies generally. Thus a payment by a person entitled to make it will keep alive the remedy on a mortgage or charge against the land, although the person making it is not in possession of the land, or is in possession in respect of a limited interest only: it will keep alive the personal remedy on a covenant, although the remedy is to be enforced against another than the person paying; and after the death of a mortgagor or specialty debtor, a payment by any one person interested in his estate will keep alive the liability of all other persons interested. Payment under the R. P. L. A., 1837, only comes into question when an action is brought for foreclosure: payment under sect. 8 of the R. P. L. A., 1874, when the action is to enforce payment of a sum of money charged on land by proceedings (other than foreclosure) against the land itself, or, if the money is also secured by covenant, by proceedings founded on the covenant; payment under sect. 5 of the Civil Procedure Act, 1833, when the money is secured by specialty, but is not charged on land.

It will be convenient to arrange the decisions under the following heads:—

Classification of the authorities.

(A) Payments which keep alive a mortgage or charge as against the land subject to it;

(B) Payments which keep alive personal remedies in respect of money charged on land;

(C) Payments which keep alive the remedies against the free assets of a deceased debtor, whether the debt is directly charged on land or no.

Under each head it will be found that, subject to sect. 14 of the Mercantile Law Amendment Act, 1856, the cases support the view that the effect of payment is to keep alive all the creditor's remedies.

Payment after statutory period.

According to the construction of the R. P. L. A., 1874, sect. 8, which has been adopted (*supra*, p. 336), a payment made after the statutory period has elapsed may revive the debt. But it is possible that a payment by a tenant for life after the statutory period would not be effectual to revive the debt against the remaindermen: *Becher* v. *Delacour* (1881), 11 L. R. Ir. 187; *Shea* v. *Moore*, [1894] 1 I. R. 158, p. 171, C. A.; *cf.* *Kirkwood* v. *Lloyd* (1849), 12 Ir. Eq. R. p. 596; *Harty* v. *Davis* (1850), 13 Ir. L. R. p. 28; *Homan* v. *Andrews* (1850), 1 Ir. Ch. R. p. 117; *Latouche* v. *O'Brien* (1846), 10 Ir. Eq. R. 113.

(A) *Payments which keep alive a Mortgage or Charge against the Land.*

The payment, as just noticed, operates, for the purpose of foreclosure, under the R. P. L. A., 1837; and for the purpose of other proceedings against the land, under the R. P. L. A., 1874, sect. 8. In either case the payment, if made by a person entitled to make it, will keep alive the remedy against the land, although the person paying may have no interest in the land, or only a limited interest in it.

Tenant for life.

Thus a payment by a tenant for life, or other limited owner in present enjoyment of the land, keeps a charge alive against the land so as to bind all persons entitled in remainder: *Barclay* v. *Owen* (1889), 60 L. T. 220. It is the duty of the limited owner to keep down the interest: *Re Fitzmaurices* (1864), 15 Ir. Ch. R. p. 461; and a mortgagee is entitled to rely upon receipt of interest from the person who for the time being represents the ownership of the land. But the creditor who relies upon payment by a tenant for life must be prepared to prove the payment strictly, and a mere admission by a tenant for life in a deed that all interest has been paid may not be sufficient: *Gregson* v. *Hindley* (1846), 10 Jur. 383. Otherwise, said Shadwell, V.C., in that case, "the grossest fraud might be practised on tenants in remainder, since for a mere sixpence

the tenant for life might sign an acknowledgment that no interest was due."

Payment by mortgagor after assignment of equity of redemption.

It seems to have been assumed by the Court of Appeal in *Newbould* v. *Smith* (1886), 33 C. D. 127—the decision in the House of Lords (1889), 14 App. Cas. 423, went on a different point—that payment by a mortgagor who had parted with his interest in the land would not be effectual to keep up the mortgage against the present owners of the land; but it was not noticed that the question had been already decided in an opposite sense by the House of Lords in *Chinnery* v. *Evans* (1864), 11 H. L. C. 115. There a mortgage was made in 1776 on estates X, Y, and Z. In 1784 a receiver was appointed on the petition of the mortgagee. Estate Z was sold by the mortgagor before, and estate X after, the appointment of the receiver, but in neither case was the purchaser aware of the mortgage. The receiver applied the rents of the Y estate in keeping down the interest on the mortgage. It was held that the receiver was the agent of the mortgagor, and that his payments were effectual to keep the mortgage alive against estates X and Z. The judgments of Lord Westbury, C., and Lord Cranworth were both based on the principle that the mortgagor is entitled to make payments on account of the mortgage, and that, so long as he duly makes them, the mortgagee is not bound to inquire how he is dealing with the equity of redemption. This principle applies equally whether, as in *Chinnery* v. *Evans*, the mortgagor assigns the equity of redemption in only part of the land comprised in the mortgage, or whether he assigns the equity in the whole. The latter case occurred in *Bradshaw* v. *Widdrington*, [1902] 2 Ch. 430, C. A., where payments made by a person who, as between himself and the mortgagor, was under an obligation to pay, were held to be effectual to keep the mortgage alive against the assignee of the land.

Chinnery v. *Evans.*

Payment by mortgagor out of possession.

Although the land is in the possession of a stranger in whose favour the statute is running as against the mortgagor, the mortgagor can still make a good payment to the mortgagee so as to preserve the right of the latter against the land: *Doe* v. *Eyre* (1851), 17 Q. B. p. 371; *Doe* v. *Massey* (1851), 17 Q. B. 373; provided that the statute had not commenced to run against the mortgagor at the date of the mortgage: *Thornton* v. *France*, [1897] 2 Q. B. 143, C. A.

Payment by

The same principle applies where the mortgagor has died,

executors of mortgagor.

and payments in respect of the mortgage debt are made by his executors. These will keep the debt alive against the land in the hands of the devisee. A payment by the devisee would keep the debt alive against the executors: *infra*, p. 369; and in either case the effect of the payment is simply to remove the bar of sect. 8 of the R. P. L. A., 1874, and allow the creditor to sue as though that section were out of the way: *cf. Re Lacey*, [1907] 1 Ch. p. 353, C. A.

Charge of specialty debt by will.

Where a testator by his will charges a specialty debt on land, the effect, as between the land and the personal estate, is the same as if the debt had been secured by mortgage of the land originally. Sect. 8 of the R. P. L. A., 1874, applies, and a payment by either the executor or the devisee is effectual as against the other. Moreover, a payment by the devisee of one estate will be effectual as against the devisee of another estate on which the same debt or part of it is charged by the will. The decision of Lord Westbury, C., to the contrary in *Dickenson* v. *Teasdale* (1862), 1 D. J. & S. 52, is no longer law: see *Re Lacey*, [1907] 1 Ch. 330, C. A.

Payment by person entitled to pay.

And a payment by any person who under the terms of the mortgage contract is entitled to make it will operate to keep the debt alive against the land. In *Lewin* v. *Wilson* (1886), 11 App. Cas. 639 (*supra*, p. 360), where this was held, H., who was personally liable for the debt on a collateral bond, was also specifically mentioned in a mortgage of W.'s land given to secure the debt as a person entitled to make payments in respect of the mortgage. Consequently a payment by H. kept alive the debt against the land: see *Cann* v. *Taylor* (1859), F. & F. 651. Sect. 14 of the Mercantile Law Amendment Act, 1856 (*infra*, p. 373), which prevents payment by one co-contractor from affecting another, does not apply to the statutes relating to money secured by mortgage.

(B) *Payments which keep alive the Personal Remedies in respect of Money charged on Land.*

Remedy on mortgagor's covenant.

Where a mortgage debt charged on land is secured also by the covenant of the mortgagor, the remedies against the land and against the mortgagor will affect different persons if the mortgagor disposes of the equity of redemption, or if the equity of redemption becomes vested after his death in devisees or in his heir-at-law. The remedy against the land has already been

considered. The remedy against the mortgagor or his executors is subject to sect. 8 of the R. P. L. A., 1874. In the case of an assignment of the equity of redemption, the assignee may be treated as the agent of the mortgagor to make payments in respect of the mortgage debt (*supra*, p. 359), and thus a payment by him will keep alive the remedy against the mortgagor on his covenant. But it is not necessary to have recourse to the doctrine of agency. The payment by the assignee is a payment by a person entitled or interested to pay, and, being thus a good payment under sect. 8, it keeps alive all the remedies for the debt, including the action on the mortgagor's covenant: *Forsyth* v. *Bristowe* (1853), 8 Ex. 716; *Dibb* v. *Walker*, [1893] 2 Ch. 429; *Alston* v. *Mineard* (1907), 51 Sol. Journ. 132.

Similarly, after the death of the mortgagor, the mortgagee is justified in accepting payment of interest from the devisee of the land, and this payment prevents sect. 8 of the R. P. L. A., 1874, from running in favour of the executors: *Re Gale* (1883), 22 C. D. 820; *Pears* v. *Laing* (1871), 12 Eq. 41; *Dibb* v. *Walker*, [1893] 2 Ch. 429.

Remedy against co-debtor or surety.

It is not clear whether an action against a surety for the mortgagor is subject to the twenty years' limitation of sect. 3 of the Civil Procedure Act, 1833, or to the twelve years' limitation of sect. 8 of the R. P. L. A., 1874 (*supra*, p. 157). If the former is the relevant statute, then the surety is entitled to the benefit of sect. 14 of the Mercantile Law Amendment Act, 1856, and a payment by the mortgagor will not keep the liability of the surety alive: *infra*, p. 373. But if the latter, then sect. 14 of the Mercantile Law Amendment Act, 1856, does not apply, and the payment by the mortgagor is effectual as against the surety: *Re Powers* (1885), 30 C. D. 291, C. A.; *Re Frisby* (1889), 43 C. D. 106, C. A.; and, where sect. 8 applies, it is effectual also against a person jointly liable as principal debtor: *Bailie* v. *Irwin*, [1897] 2 I. R. 614; *cf. Vincent* v. *Willington* (1842), Long. & T. 456; *Kirkwood* v. *Lloyd* (1847), 11 Ir. Eq. R. 561, p. 576; *Re Earl of Kingston's Estate* (1869), Ir. R. 3 Eq. 485. If the surety takes the benefit of sect. 8, he must also take the burden; *per* Cotton, L.J., in *Re Frisby* (*loc. cit.*, p. 116). But there must be an actual payment. The mere appointment of a receiver of the estate of one judgment debtor, who receives nothing on account of the debt, does not preserve the liability of a joint debtor: *Re Greene's Estate* (1884), 13 L. R. Ir. 461, C. A.

(C) *Payments which keep alive the Remedies against the Free Assets of a Deceased Specialty Debtor.*

Administration action.

Land of a debtor, although not charged by him with the debt in his lifetime or by will, may be made liable for its payment after his death under the statutes which make real estate assets in equity for the payment of debts. Under these statutes, however, the debt does not become payable out of land within the meaning of sect. 8 of the R. P. L. A., 1874: *Roddam* v. *Morley* (1857), 1 De G. & J. 1; and the limitation on the administration action, which must be brought in order to make the assets available, is *primâ facie*, in the case of a specialty debt, imposed by sect. 3 of the Civil Procedure Act, 1833. In this case the question of the effect of payment in preserving the liability of persons interested in the land which the creditor seeks to reach, depends on sect. 5 of that statute. If, however, the debt, though not charged on the land in question, is charged on other land of the testator, either because it was originally a mortgage debt, or because it has been charged on such other land by his will, then the relevant statute is sect. 8 of the R. P. L. A., 1874. But, so far as these two statutes are concerned, the distinction is not material, inasmuch as, under each, the effect of payment in keeping the debt alive against assets chargeable in an administration action is the same; though it is very material when it is a question of the application of sect. 14 of the Mercantile Law Amendment Act, 1856, since this restricts the effect of payment under sect. 5 of the Civil Procedure Act, 1833, but not of payment under sect. 8 of the R. P. L. A., 1874: *Re Lacey*, [1907] 1 Ch. 330, C. A.

Liability of land as assets.

The liability of heirs to make good specialty debts in which they were bound out of the lands descended existed under the early law. The liability was extended to devisees by the Statute of Fraudulent Devises (3 Will. & Mary, c. 14, s. 2, made perpetual by 6 & 7 Will. 3, c. 14), and the procedure for recovering specialty debts—that is, debts secured by instrument under seal by which the heirs are bound—against the heir or devisee to the extent of the land descended or devised was affirmed and amended by the Debts Recovery Act, 1830 (1 Will. 4, c. 47). The liability of lands of a deceased debtor to his simple contract debts was first admitted in the case of traders (47 Geo. 3,

c. 74), and by the Administration of Estates Act, 1833 (3 & 4 Will. 4, c. 104), all lands of a deceased person were made assets in equity for the payment of his debts, as well by specialty as simple contract. The liability of the land ceases as soon as it has been *bonâ fide* aliened: *British Mutual Investment Co.* v. *Smart* (1875), 10 Ch. 567; *Re Atkinson*, [1908] 2 Ch. 307; but, subject to this, the result of the statutes is that, for the purpose of a specialty debt, all the devisees under the will, whether they are devisees of a mortgaged or a free estate, stand on the same footing and are jointly liable to the specialty creditor: *per* Farwell, L.J., in *Re Lacey*, [1907] 1 Ch. p. 349. And it is now the same, apparently, in respect of simple contract debts.

Payment preserves all remedies.

From the numerous cases already cited, in which a part payment by one person liable has been held effectual to preserve the liability of others, it may be inferred that the same result will follow when reliance is placed on a payment for the purpose of maintaining the liability of assets in an administration action; and the fact that the liability of the various persons who take the assets is joint affords an additional reason for holding the payment by one to be effectual against all. This view of the effect of part payment was taken by Lord Cranworth, C., in *Roddam* v. *Morley* (1857), 1 De G. & J. 1: "I have come to the conclusion that when a part payment or payment of interest has been made, which has the effect of preserving any right of action, that right will be saved, not only against the party making it, but also against all parties liable on the specialty"; that is, all the parties who could, by virtue of the existence of the specialty debt, be reached for the purpose of payment: *Re Lacey*, [1907] 1 Ch. p. 354, C. A. Williams and Crowder, JJ., who assisted Lord Cranworth, based the result also on the analogy of the authorities—*Fannin* v. *Anderson* (1845), 7 Q. B. 811 and *Towns* v. *Mead* (1855), 16 C. B. 123 (*supra*, p. 296)—which decided that an action suspended under 4 & 5 Anne, c. 16, s. 19, against a defendant who was abroad, was suspended as to all the defendants; but this argument is not found in the later cases, and it is unnecessary to have recourse to it. The question depends on the joint liability of the parties, and upon the circumstance that payment by one operates in relief of all. Such payment, therefore, removes the bar of the statute, and leaves it open to the creditor to bring his action as though the statute were out of the way. The

Roddam v. *Morley.*

immediate point decided in *Roddam* v. *Morley* was that a payment by a devisee for life kept the specialty debt alive against the persons entitled in remainder; and this was sufficiently covered by Lord Cranworth's observation that the section was clearly intended to keep alive some right of action, and no action could be maintained which was not in effect an action against those who represented the whole inheritance. But the reason of the decision went further and extended the effect of payment to persons jointly liable.

Coope v. *Cresswell.*

In *Coope* v. *Cresswell* (1866), 2 Ch. 112, on the other hand, Lord Chelmsford, C., held that a specialty debt could not be kept alive under sect. 5 of the Civ. Proc. Act, 1833, as against a beneficial devisee of land by payments made by other persons representing the testator's estate. Under the will of a testator, trustees, who were also the executors, held the P. estate on trust to sell and pay mortgage and other debts, and the D. estate in trust for A. for life with remainders over. The trustees paid interest on a specialty debt of the testator, and Lord Chelmsford held that this had not kept the debt alive against A. "Is there," he said, "anything unreasonable in supposing that [the Legislature] intended what their words literally express; and that in each case of an action brought, you are to look to the party whose liability is sought to be enforced, and who uses the Statute of Limitations as a defence? The whole frame of the section seems to point in this direction." Hence, while he did not dispute the correctness of *Roddam* v. *Morley* with respect to the effect of payment by a limited owner as against the remaindermen, he declined to apply that decision as between the devisees of different estates and the personal representatives of the debtor. The decision of Lord Westbury, C., in *Dickenson* v. *Teasdale* (1862), 1 D. J. & S. 52, also, was founded on the same principle; namely, that payment only affects the person who makes it, or the land which he represents. He repudiated strongly the notion that payment by one of several devisees of distinct estates could extend to all the devisees.

Re Lacey.

But in spite of this dissent, the view of the effect of payment enunciated in *Roddam* v. *Morley* (*supra*) was adopted in *Pears* v. *Laing* (1871), 12 Eq. 41, and *Leahy* v. *De Moleyns*, [1896] 1 I. R. 206, C.A.; and this view has been affirmed, and *Coope* v. *Cresswell* and *Dickenson* v. *Teasdale* overruled, by *Re Lacey*, [1907] 1 Ch. 330, C. A. In this case a testator left a mortgaged estate to his

son, and a free estate on trust for his wife for life, and then for sale and division of the proceeds among his four daughters. The son duly paid the interest on the mortgage, and, the mortgaged estate proving deficient, it was held that these payments kept alive the liability of the free estate as assets in administration. The case arose under sect. 8 of the R. P. L. A., 1874, while *Roddam* v. *Morley* and *Coope* v. *Cresswell* arose on sect. 5 of the Civil Procedure Act, 1833. But, as already intimated, the same construction applies to both sections, and the Court of Appeal decided in favour of *Roddam* v. *Morley*, supported as it was by nearly all the other authorities. "I can find no distinction between the two sections sufficient to make the reasoning of the two common law judges and the Lord Chancellor in *Roddam* v. *Morley* inapplicable to the present case": *Re Lacey*, *per* Farwell, L.J. (*loc. cit.*, p. 345). Hence it is now settled that payment in respect of a specialty debt by any one of the persons against whom it can be enforced in an administration action keeps the debt alive as against all other such persons. This, however, is subject, in cases depending on sect. 5 of the Civil Procedure Act, 1833, to the provisions of sect. 14 of the Mercantile Law Amendment Act, 1856.

Payment by a Co-debtor.

Co-debtors.

But while in general a payment is not confined in its effect to the person making it, a different rule has been introduced in certain cases for co-debtors, by the Mercantile Law Amendment Act, 1856, which provides as follows:—

Mercantile Land Amendment Act, 1856, s. 14.

"In reference to the provisions of the Acts, 21 Jac. 1, c. 16, s. 3, and 3 & 4 Will. 4, c. 42, s. 3, and 16 & 17 Vict. c. 113, s. 20, when there shall be two or more co-contractors or co-debtors, whether bound and liable jointly only, or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator, shall lose the benefits of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money, by any other or others of such co-contractors, co-debtors, executors or administrators."

Exclusion of cases under R. P. L. A., 1874, s. 8.

Previously to the R. P. L. A., 1874, where money was charged on land and also secured by covenant, an action on the covenant was limited by the Civil Procedure Act, 1833, and hence a

payment by one of several persons liable was subject to sect. 14 of the Mercantile Law Amendment Act, 1856, and did not keep alive the action against the others. But in such cases the action is now limited by sect. 8 of the R. P. L. A., 1874, and this section, as previously sect. 40 of the R. P. L. A., 1833, is not affected by sect. 14. Consequently, where money is charged upon land, co-debtors are no longer entitled to the benefit of the section, and a payment by one will keep the action alive as against all: see cases cited *supra*, pp. 371–373.

But where the debt is not charged on land, the relevant statute is the Civil Procedure Act, 1833, s. 5, and sect. 14 of the Mercantile Law Amendment Act, 1856, applies, so as to restrict the effect of payment to the person making it; and this is so where a specialty debtor dies possessed of land, and has not charged the debt upon any of it. Several devisees of distinct estates under the same will are co-debtors in respect of their testator's specialties within the meaning of sect. 14, though not tenant for life and remainderman of a single estate: *Re Lacey*, [1907] 1 Ch. p. 349, *per* Farwell, L.J. Hence where the specialty debt is not charged on land, payment by one devisee does not bind the others; where the debt is charged on land, it does: *supra*, p. 373.

(2) *Simple Contract Debts.*

(i.) *Implied Promise.*

Implication of promise to pay.

The Limitation Act, 1623, may be excluded by part payment of the debt or payment of interest, when the payment is made under such circumstances that there can be implied from it a promise to pay the balance of the debt, or the debt, as the case may be. "It must be a payment of a portion of the debt, accompanied by an acknowledgment from which a promise may be inferred to pay the remainder": *per* Parke, B., in *Foster* v. *Dawber* (1851), 6 Ex. p. 853; *Ex parte Topping* (1365), 4 D. J. & S. p. 564. "The bar of the statute is precluded by payment of interest; because the payment of interest is an acknowledgment of the debt, and the law implies from the acknowledgment of the debt a promise to pay it": *per* Turner, V.C., in *Fordham* v. *Wallis* (1852), 10 Hare, p. 225. It follows that payment into court cannot exclude the statute: *Long* v. *Greville* (1824), 3 B. & C. 10; *Reid* v. *Dickons* (1833), 5 B. & Ad. 499.

Payment of interest.

If the principal sum carries interest by agreement, the payment of interest is really part payment of the debt: *Bealy* v. *Greenslade* (1831), 2 Cr. & J. 61; but the payment is equally effectual, although interest is not expressly reserved. It is an acknowledgment that the debt is due: *Bamfield* v. *Tupper* (1851), 7 Ex. 27; see *Purdon* v. *Purdon* (1842), 10 M. & W. 562; *Re Rutherford* (1880), 14 C. D. 687, C. A.; and it avoids the statute, provided, in the case of payment on account of a promissory note, that the note remains in the hands of the payee or his representatives: *Bealy* v. *Greenslade*. Where the debt carries interest, a payment on account of principal has been held not to raise an implied promise to pay the interest: *Collyer* v. *Willock* (1827), 4 Bing. 313.

Invalid note.

Promissory notes given under the Charitable Loan Societies (Ireland) Act, 1843, are not renewable, but payments on the footing of invalid renewals are nevertheless effectual to keep alive the liability of the borrower on the primary consideration: *Lindsay* v. *Macguire*, [1899] 2 I. R. 554.

Payment must be attributable to the debt sued on.

Since the payment must be such as to imply a promise to pay the remainder of the debt, it must be shown that it was made as part payment of a greater debt, and that such debt is the one for which the action is brought: *Tippetts* v. *Heane* (1834), 1 C. M. & R. 252. "Unless it amounts to an admission that more is due, it cannot operate as an admission of any still existing debt": *per* Parke, B., in *Tippetts* v. *Heane*; *Waters* v. *Tompkins* (1835), 2 C. M. & R. p. 726; *Waugh* v. *Cope* (1840), 6 M. & W. 824; *Goodwin* v. *Parton* (1879), 41 L. T. 91; *Re Boswell*, [1906] 2 Ch. 359; see *per* Maule, J., in *Burr* v. *Boulton* (1846), 2 C. B. p. 481. Similarly, payment of interest must be referable to the debt claimed: *Sims* v. *Brutton* (1850), 5 Ex. 802; *Re Fountaine* (1908), *Times*, Dec. 9.

Several debts.

Where there is only one debt between the parties, a payment of interest will be referred to that debt without further evidence: *Evans* v. *Davies* (1836), 4 A. & E. 840. Where there is more than one debt, the plaintiff must make out distinctly that the payment on which he relies as excluding the statute is applicable to the debt sued for: *Burkitt* v. *Blanshard* (1848), 3 Ex. 89; *cf.* *Holme* v. *Green* (1816), 1 Stark. 488. To raise an implied promise the appropriation must be made by the debtor; and oral admissions of the debtor, after payment, that it was made on a particular account are admissible: *Beran* v. *Gething* (1842), 3 Q. B. 740; *Baildon* v. *Walton* (1847), 1 Ex. 617, p. 633.

Appropriation by debtor.

Appropriation by creditor.

If the debtor does not appropriate at the time of payment, the right to appropriate devolves upon the creditor, and can be exercised by him at any time (*The Mecca*, [1897] A. C. 286), before proceedings questioning the debt: *Smith* v. *Betty*, [1903] 2 K. B. 317, C. A.; and the creditor can apply any particular payment to a statute-barred debt: *Mills* v. *Fowkes* (1839), 5 Bing. N. C. 455. But an appropriation by the creditor cannot exclude the statute, since it implies no promise on the part of the debtor: *Nash* v. *Hodgson* (1855), 6 D. M. & G. 474, 490.

No appropriation made.

If there has been no appropriation by the debtor, and all except one of the debts are statute-barred, the payment will be attributed exclusively to that one: *Nash* v. *Hodgson*; and where the defendant has throughout denied one debt, the payment may be attributed to the other: *Burn* v. *Boulton* (1846), 2 C. B. 476; *Collinson* v. *Margesson* (1858), 27 L. J. Ex. 305, *per* Martin, B. Where no such ground of distinction exists, and there is no evidence of appropriation by the debtor, it may be that neither debt is taken out of the statute: *Burn* v. *Boulton*; though in general there would be evidence to go to the jury that the payment was made on account of both of the debts: *Walker* v. *Butler* (1856), 6 E. & B. 506; *Re Boswell*, [1906] 2 Ch. 359.

Successive items of account.

Where there are successive independent transactions between the parties, a payment on account of one particular transaction will not exclude the statute as to the entire account: *Wycombe Union* v. *Eton Union* (1857), 1 H. & N. 687. Thus where a number of advances are made from time to time, and there are specific repayments of the later advances, these do not keep alive the general balance in respect of the earlier debt: *Re Rainforth* (1879), 49 L. J. Ch. 5, C. A. And if at the time of payment there are various sums due, some of which accrued more than six years before the payment, these earlier items will not be taken out of the statute, unless the payment can be shown to have been made with reference to them: *Mills* v. *Fowkes* (1839), 5 Bing. N. C. 455; as where the items are connected so as to make one account, and a payment is clearly made in respect of the entire balance due: *Walker* v. *Butler* (1856), 6 E. & B. 506; or where a payment made on a statement of accounts which includes the earlier items, is larger than the balance due in respect of items within six years: *Re Friend, Friend* v. *Young*, [1897] 2 Ch. 421.

Circumstances

The implication of a promise to pay arising out of part-

payment will be rebutted if the accompanying circumstances show that the debtor did not intend to promise; as where he says that he owes the money, but will not pay the rest: *Wainman* v. *Kynman* (1847), 1 Ex. 118; *Collyer* v. *Willock* (1827), 4 Bing. 313; *Linsell* v. *Bonsor* (1835), 2 Bing. N. C. 241; or where the payment is compulsory, as in the case of a payment made under a judgment: *Morgan* v. *Rowlands* (1872), L. R. 7 Q. B. 493; or where it is made in the bankruptcy of the debtor: *Davies* v. *Edwards* (1851), 7 Ex. 22. excluding promise.

Part-payment can revive a debt which is barred at the date of payment; see, for example, *Maber* v. *Maber* (1867), L. R. 2 Ex. 153; though the contrary seems to have been intimated in *Nash* v. *Hodgson* (1855), 6 D. M. & G. p. 482. And a debtor on the eve of bankruptcy can properly make a payment with a view to reviving the claim of a creditor, so that he may share in the estate with other creditors, provided the claim is *bonâ fide* regarded as an existing liability. Such a payment is not a fraudulent preference: *Re Lane* (1889), 23 Q. B. D. 74. Revival of statute-barred debt.

The payment need not be made in cash. Any facts which would be sufficient to establish a plea of payment in an action to recover money will be sufficient: *per* Martin, B., in *Maber* v. *Maber* (1867), L. R. 2 Ex. 153; *Worthington* v. *Grimsditch* (1845), 7 Q. B. p. 484. Thus, maintaining a child in lieu of paying interest is equivalent to payment: *Bodger* v. *Arch* (1854), 10 Ex. 333. And payment may be made by delivery of goods, it being a question for the jury whether the delivery was made on account of the particular debt: *Collinson* v. *Margesson* (1858), 27 L. J. Ex. 305; *Hart* v. *Nash* (1835), 2 C. M. & R. 337. "Where any thing is received upon agreement in reduction of a debt, that is a payment sufficient to take the debt out of the Statute of Limitations": *Hooper* v. *Stephens* (1835), 4 A. & E. 71; see *Pearce* v. *Selby* (1842), 6 Jur. 896. Payment in money not necessary.

Moreover, actual payment is not required. Where a married woman, whose trustees had lent trust money to the husband, gave them a receipt for interest in order to avoid a claim on the husband, this was equivalent to payment by the husband: *Amos* v. *Smith* (1862), 31 L. J. Ex. 423: *cf. Re Dixon* (1900), 48 W. R. 665, C. A. And so, too, where a debtor was on the point of paying interest, and the creditor stopped him, and gave a receipt to his wife, saying he made her a present of it: *Maber* v. *Maber* (1867), L. R. 2 Ex. 153. Constructive payment.

Set-off.

Where parties having cross claims against each other agree that they shall be set-off, this is equivalent to payment. Thus if they have mutual accounts with items on both sides, and they meet together and go through the accounts and strike a balance in favour of one, the setting-off of the earlier items against each other operates as payment; and there is a new promise for payment of the balance: *Ashby* v. *James* (1843), 11 M. & W. 542; *Clark* v. *Alexander* (1844), 8 Scott N. R. 147; *per* Parke, B., in *Pott* v. *Clegg* (1847), 16 M. & W. p. 327. But in the absence of agreement that cross claims shall be set-off against each other, there is no part payment. Where A. was indebted to B. for rent, and B. to A. for wages, and there was no agreement for set-off, the statute was not excluded as regarded the claim for wages: *Williams* v. *Griffiths* (1835), 2 C. M. & R. 45. "You must show," said Parke, B., "an agreement between the parties that the rent should go in part payment of the wages."

Retention of money.

The retention by the creditor of money of the debtor in his hands will not exclude the statute, unless it appears that the debtor authorized the retention and intended to acknowledge his indebtedness as to the balance: *Thomas* v. *Cross* (1852), 7 Ex. 728; *Waugh* v. *Cope* (1840), 6 M. & W. 824; *Re Boswell*, [1906] 2 Ch. p. 368. See as to retention by a trustee: *Stewart* v. *Connick* (1871), Ir. R. 5 C. L. 562; by a steward: *Re Hawkins* (1879), 28 W. R. 240.

Payment by bill.

Conditional part-payment is sufficient to imply a promise, and hence the statute is excluded where a bill of exchange is given on account of the debt: *Turney* v. *Dodwell* (1854), 3 E. & B. 136. But giving a bill for the amount due does not operate as a promise to pay the original debt, if the debtor intends to limit his liability to the bill; and if the bill has been released, no action will lie for the original debt, if then more than six years old: *Foster* v. *Dawber* (1851), 6 Ex. 839. The drawing by the debtor of a bill of exchange which is accepted by a third party is probably not an acknowledgment so as to save the statute; but if it is, it is evidence of a fresh promise at the time when it is drawn; not when it is paid by the acceptor: *Gowan* v. *Forster* (1832), 3 B. & Ad. 507. Similarly the giving of a cheque is evidence of a fresh promise at the time when the cheque is given, not when it is paid: *Marrecco* v. *Richardson*, [1908] 2. K. B. 584, C. A.

Creditor must

For a promise to be implied, the creditor must be aware of

the payment. Hence where the debtor carries interest to the credit of the creditor in his books, this is no payment to exclude the statute: *Jackson* v. *Ogg* (1859), Johns. 397. be aware of payment.

(ii.) *Proof of Payment.*

The Statute of Frauds Amendment Act, 1828, which provides that acknowledgments must be in writing (*supra*, p. 325), expressly excepts the effect of payment:— Part payment excluded from Lord Tenterden's Act.

> "Provided always that nothing herein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest by any person whatsoever." 9 Geo. 4, c. 14, s. 1.

Thus part payment is quite outside the Act, and the fact of payment may be proved by evidence of a parol acknowledgment of payment on account of principal, or of payment of interest: *Cleave* v. *Jones* (1851), 6 Ex. 573; *Edwards* v. *Janes* (1855), 1 K. & J. 534; but not by indorsement of payment by the creditor:— Indorsement of payment by creditor.

> "No indorsement or memorandum of any payment, written or made after [1st January, 1829], upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of [the statute 21 Jac. 1, c. 16]. Sect. 3.

For Ireland see ss. 24 and 25 of the Ir. C. L. P. A., 1853.

Sect. 3 of Lord Tenterden's Act only applies to a memorandum on the writing which contains the contract sued upon. Hence payment can be proved after the death of the creditor by an entry made by him in his books, for at the time the entry was against his interest: *Bradley* v. *James* (1853), 13 C. B. 822. But it is otherwise if the entry is made after the statute has run, for it is then in the creditor's favour: *Newbould* v. *Smith* (1885), 29 C. D. 882, C. A.; see *Briggs* v. *Wilson* (1854), 5 D. M. & G. 12. Entry by creditor in his books.

And the provision only applies where the memorandum is made by or on behalf of the creditor. An indorsement of payment of interest on a promissory note by the debtor is admissible evidence: *Purdon* v. *Purdon* (1842), 10 M. & W. 562. Indorsement by debtor.

(iii.) *By whom Payment may be made.*

By the debtor or his agent.

In order that the necessary promise may be implied the payment must be by the debtor or by some person authorized to pay on his behalf. Where A. gave a promissory note to B., who indorsed it to his bankers and obtained on it from them money which he advanced to A., payments of interest by B. to the bank did not keep the note alive against A., B. not being the agent of A. for that purpose: *Harding* v. *Edgecumbe* (1859), 28 L. J. Ex. 313. And an agent authorized to offer a sum in full discharge cannot bind the debtor by giving it in part payment: *Linsell* v. *Bonsor* (1835), 2 Bing. N. C. 241. Where a note was signed by "J. H., churchwarden, and J. E., overseer, or others for the time being," the jury might properly infer that J. H. and J. E. had constituted the overseers for the time being their agents to make payments of interest: *Jones* v. *Hughes* (1850), 5 Ex. 104; *Rew* v. *Pettett* (1834), 1 A. & E. 196.

Payment by married woman.

Under the Married Women's Property Act, 1882, a married woman can make a payment so as to bind her separate estate: *Beck* v. *Pierce* (1889), 23 Q. B. D. 316, C. A. As to payment by a married woman under the old law: see *Pittam* v. *Forster* (1823), 1 B. & C. 248; *Neve* v. *Holland* (1852), 18 Q. B. 262.

By receiver.

A receiver appointed by the mortgagee of a business, who under the terms of the power in the mortgage deed by virtue of which he is appointed is empowered to pay the business debts of the mortgagor, is the agent of the mortgagor for the purpose of making payments in respect of such debts, and this agency binds the mortgagor's estate after his death. Hence, though the receiver is not appointed till after the mortgagor's death, a payment by him will be treated as a payment by the agent of the executor and will keep alive the debt against the personal estate: *Re Hale*, [1899] 2 Ch. 107, C. A. And payments on account of maintenance made by the receiver in lunacy of the estate of a pauper lunatic have been held to keep alive the claim of the guardians to the arrears of sums due for maintenance beyond six years: *Wandsworth Union* v. *Worthington*, [1906] 1 K. B. 420. But payments by a trustee under a creditors' deed on account of a debt do not imply any promise by the debtor that the balance is due and payable on demand, so as to exclude the statute as regards that debt: *Ex parte Topping* (1865), 4 D. J. & S. 551.

(iv.) *To whom Payment may be made.*

To creditor or his agent.

Since payment only keeps alive a simple contract debt where a promise can be implied, it follows that the payment must be made either to the creditor or his agent: *Stamford, etc., Banking Co.* v. *Smith*, [1892] 1 Q. B. 765, C. A.; though an exception is admitted where a payment is made for the benefit of the estate of a deceased person, and the payment is effectual if made to a person purporting to act on behalf of the estate, although not duly constituted administrator: S. C., explaining *Clark* v. *Hooper* (1834), 10 Bing. 480; *cf. Bodger* v. *Arch* (1854), 10 Ex. 333. A payment made for the benefit of a creditor at his direction operates as a payment to him: *Worthington* v. *Grimsditch* (1845), 7 Q. B. 479. "By agreement between the parties," said Denman, C.J., in that case (p. 484), "the payment by the debtor of money owing by the creditor to a third person may be a mode of payment either of interest, or, in part, of the principal to the creditor; and such agreement, like any other, may be proved by implication, or course of dealing, or ratification, as well as by express and previous direction:" *cf. Bodger* v. *Arch* (1854), 10 Ex. 333.

Payment to agent.

Payment can be effectually made to an agent of the creditor: see *Evans* v. *Davies* (1836), 4 A. & E. 840; and for this purpose a *cestui que trust* is usually the agent of the trustee: *Megginson* v. *Harper* (1834), 2 Cr. & M. 322; see *Gleadow* v. *Atkin* (1833), 1 Cr. & M. 410. And, notwithstanding the Married Women's Property Act, 1882, it would seem that payment of interest to a husband on a debt due to his wife may still be regarded as payment to her agent: see *Hart* v. *Stephens* (1845), 6 Q. B. 937.

(v.) *Effect of Payment.*

Co-debtors: former law.

Since payment excludes the statute upon the ground of implied promise, it follows that the action is kept alive only as against the person by whom or by whose agent the payment has been made. Where there are several persons jointly liable for a simple contract debt, each was formerly regarded as agent of the rest for the purpose of making a payment on account of the debt, and hence from a payment by one there was implied a promise on the part of all so as to exclude the statute: *Whitcomb* v. *Whiting* (1781), Doug. 652; 1 Sm. L. C. 11th ed. 579;

Dowling v. *Ford* (1843), 11 M. & W. 329; provided it was clearly referable to the joint debt: *Holme* v. *Green* (1816), 1 Stark. 488. But the doctrine, it was said, ought not to be extended: *Brandram* v. *Wharton* (1818), 1 B. & A. 463, and it was not applied where the joint contract had been severed by death. Thus the executors of a deceased co-contractor were not bound by payments made by the survivor: *Atkins* v. *Tredgold* (1823), 2 B. & C. 23; and, on the other hand, payments made by the executors did not bind the survivor: *Slater* v. *Lawson* (1830), 1 B. & Ad. 396. And the doctrine did not apply where the liability was several, or joint and several: *Re Wolmershausen* (1890), 62 L. T. 541.

Payment now effectual only as against co-debtor making it.

The doctrine of implied agency as between co-debtors was abolished by sect. 14 of the Mercantile Law Amendment Act, 1856 (*supra*, p. 373). That section provides that one of several co-contractors, or of the executors or administrators of a contractor, shall not lose the benefit of the Statute of James by reason only of payment by another co-contractor, or executor or administrator. Consequently payment by a principal debtor does not keep alive the debt against the surety and *vice versâ*: *Re Wolmershausen* (1890), 62 L. T. 541. And it is the same where the simple contract debt is charged on land, since the personal remedy is subject to the six years' limitation: *Barnes* v. *Glenton*, [1899] 1 Q. B. 885, C. A.

"By reason only of payment."

Sect. 14 of the Mercantile Law Amendment Act, 1856, provides that one co-contractor shall not be chargeable by reason *only* of payment by another co-contractor. Where a surety consented by letter that the receipt by the creditor of a dividend from the estate of the principal debtor should not prejudice the claim against himself, the case was not taken out of sect. 14. The receipt of the dividend was payment only, and the surety was entitled to the benefit of the statute: *Cockrill* v. *Sparkes* (1863), 1 H. & C. 699. And although one debtor pays with the consent of his co-debtor, this is still payment only, and the latter is not affected: *Jackson* v. *Woolley* (1858), 8 E. & B. 778, reversed in the Exchequer Chamber (*ibid.*, p. 784), on the ground that sect. 14 was not retrospective.

Right of contribution.

But sect. 14 only protects a co-contractor, B., from having his liability to the common creditor kept alive by payment by another co-contractor, A. It does not touch the question of the liability of the co-contractors *inter se*, and the right to

contribution which arises when A. has been compelled to pay more than his share may be enforced against B. notwithstanding that the creditor's claim was kept alive against A. by payment, and that it is barred as against B.: *Gardner* v. *Brooke*, [1897] 2 I. R. 6, 20, C. A.

Partner.

Although the doctrine of implied agency as between co-debtors is abolished, one may still be the actual agent of the other so as to bind him by payment. In the absence of evidence to the contrary one partner is presumed to be the agent of the other to make payments in respect of partnership debts: *Goodwin* v. *Parton* (1879), 41 L. T. 91; and though this agency is in general terminated by a dissolution of partnership (*Watson* v. *Woodman* (1875), 20 Eq. 721), it may, under special circumstances, be treated as continuing; where, for instance, the retirement of a partner is kept secret, and payments of interest are made in the name of the firm: *Re Tucker*, [1894] 3 Ch. 429, C. A.; *cf. Braithwaite* v. *Britain* (1836), 1 Keen, 206.

Co-executor.

Prior to the Mercantile Law Amendment Act, 1856, it was the better opinion that a payment by an executor was not effectual to exclude the statute in an action against all, unless it had been made with the concurrence of all: *Tullock* v. *Dunn* (1826), Ry. & M. 416; *Scholey* v. *Walton* (1844), 12 M. & W. 510, 514. Under sect. 14 a payment by an executor does not impose any personal liability for the debt upon the co-executors, but it binds the estate and enables the debt to be recovered out of the estate even after the death of the executor who made the payment: *Re Macdonald*, [1897] 2 Ch. 181.

Person filling different characters.

Where a payment is made by a person who fills two different characters, it is a question of fact in which character he makes it. The question arises where one of two persons jointly liable dies, having appointed the other his executor. In *Atkins* v. *Tredgold* (1823), 2 B. & C. 23, A. and B. were liable on a joint and several promissory note, and A. died, having appointed B. one of his executors. Interest was paid by B., and it was left to the jury to determine in what character he paid it. They found that he paid it in pursuance of his own liability, and not as executor of A. So where a surviving partner, who is executor of a deceased partner, makes payments which, as surviving partner, he is bound to make, these will usually be taken to have been made by him personally, and not as executor: *Way* v. *Bassett* (1845), 5 Hare, 55; *Thompson* v.

Waithman (1856), 3 Drew. 628, especially if the payments appear in the accounts of the business, and not of the executors: *Brown* v. *Gordon* (1852), 16 Beav. 302. In these cases there is originally a double liability, and the surviving joint debtor, in making a payment, is presumed to be discharging his own liability.

The question may also arise where, upon the death of a sole debtor, the debt is recoverable against assets which are held by the same person in different rights; where, for instance, the person who makes the payment is executor and also beneficial devisee of real estate. In such a case the payment will not be attributed to his character of executor only, since the moral obligation to discharge the debt attaches to him equally as devisee: *Fordham* v. *Wallis* (1853), 10 Hare, 217, p. 225; *cf. Shea* v. *Moore*, [1894] 1 I. R. p. 171, C. A.

Real and personal estate of deceased debtor.

It has been seen (*supra*, p. 373) that, subject as to debts not charged on land to sect. 14 of the Merc. Law Amend. Act, 1856, payment in respect of a specialty debt by any one of the persons interested in the real estate of a testator, or by the personal representatives, keeps the remedies for the debt alive against all the assets, real and personal. The result depends upon the statutory provisions relating to payment. Under the statutes payment by any person entitled to make it removes the statutory bar and sets free the action generally. The effect of payment in respect of a simple contract debt depends upon quite different considerations. It excludes the statute only so far as it implies a promise, and hence it excludes it only as against persons by whom such promise is impliedly made. In general this means that it is only the person making the payment who loses the benefit of the statute. Consequently, where a debtor has died, a payment by his legal personal representatives does not save the statute as regards persons beneficially interested in the real estate: *Putnam* v. *Bates* (1826), 3 Russ. 188; *Fordham* v. *Wallis* (1852), 10 Hare, 217; and, conversely, payment by a devisee raises no implication of a promise to pay on the part of the executor, and does not keep the statute alive against the personal estate: *Boatwright* v. *Boatwright* (1873), 17 Eq. 71. *Brocklehurst* v. *Jessop* (1835), 7 Sim. 438, is not to be accepted as an authority to the contrary: see *White* v. *Hillacre* (1839), 3 Y. & C. Ex. p. 607; *Fordham* v. *Wallis* (*supra*).

Fordham v. *Wallis.*

In *Fordham* v. *Wallis* a testator who died in 1843 was indebted in the sum of £2000 on a promissory note dated

November 14, 1826. By his will he devised the X estate to Wallis, Chapman, and Nash in trust for Sarah Wedd for life with remainders over; he appointed Wallis, Chapman, and Nash his executors; he devised to Wallis and Chapman respectively certain interests in real estate, and he bequeathed to Wallis one-half of the residue of his personal estate. Interest on the £2000 was paid by the agents of the executors in 1843, 1846, and 1847, and a suit for administration of the real and personal estate was commenced in 1849. It was held by Turner, V.C., (1) that no distinction could be drawn between the two characters of executors and beneficial devisees which Wallis and Chapman filled (*vide supra*, p. 384), and that the payments by them kept the debt alive against their interests in the real estate; (2) that as regards the characters of Wallis, Chapman, and Nash as devisees in trust and as executors, the payments were made by them as executors; and (3) that payments made by them as executors did not bind Sarah Wedd and persons other than themselves beneficially interested in the real estate.

Upon the third point the Vice-Chancellor said: "Apart from purely legal considerations, it cannot, I think, be doubted that it ought not to be in the power of any person by his admission to revive a right against another, which, but for that admission, would have been wholly extinguished. . . . But then it is said that this principle ought not to have been applied to cases such as *Putnam* v. *Bates* and the present case; that the liability of the real estate was so connected with the liability of the personal estate as to preclude the application of the principle; but I think that what we have to consider in these cases is the act of the person, and not the position of the estate; for the existence or non-existence of the demand depends upon the act of the person, and not upon the relative liability of the property."

The restriction, in the case of simple contract debts, of the effect of payment to the person making it is an obvious result of the doctrine that payment operates by way of implied promise; and though, perhaps, this is not expressly stated in the passage just quoted, yet it was recognized in *Roddam* v. *Morley* (1857), 1 De G. & J. p. 15, that *Putnam* v. *Bates* and *Fordham* v. *Wallis* both depended upon the doctrine of implied promise: *cf. Briggs* v. *Wilson* (1854), 5 D. M. & G. 12. Their authority, consequently, is in no way affected by the more extended operation given to

payment in *Roddam* v. *Morley* and *Re Lacey*, [1907] 1 Ch. 330, C. A., decisions which depend, not upon that doctrine, but upon the statutory effect of payment.

Payment by tenant for life.

It has been held that a payment by a devisee for life in respect of a simple contract debt of the testator keeps alive the liability of the devised estate as against the devisees in remainder: *Re Hollingshead* (1888), 37 C. D. 651. The tenant for life represents, for the time being, the devised estate, and is able to promise on behalf of the succeeding owners.

By co-devisee.

In *Re Chant*, [1905] 2 Ch. 225, it was held, further, that payment by the devisee of one estate kept the simple contract debt alive against the devisees of other estates of the debtor; but the decision assumed that there was no material difference in this respect between the case of a simple contract debt and a specialty debt. This assumption is not warranted. Although the proceedings for making the real estate available are equitable, yet the Court is bound, as to simple contract debts, by the Limitation Act, 1623, and by the legal doctrine as to the effect of part payment, which has been developed under that Act. And the promise implied from payment by a devisee, which alone keeps the debt alive, does not affect any other estate than that in which the person making the payment is interested. Even if this were not so, yet a like restriction would follow from sect. 14 of the Mercantile Law Amendment Act, 1856. Several devisees of different estates of a debtor are "co-contractors" within that section, so that a payment by one is limited in its effect to himself: *Re Lacey*, [1900] 1 Ch. 330, C. A.

CHAPTER VIII.

PUBLIC AUTHORITIES.

Acts done under statutory powers.

Previously to 1893 there were a great number of statutes, both public general statutes and local and personal statutes, which gave special privileges as regards litigation to persons who were sued for acts committed in the apparent exercise of statutory powers or of certain public offices. These privileges included the right to notice of action, and also a special period of limitation, which was usually three or six months; though for local and personal statutes a uniform period of two years was introduced by the Limitation of Actions and Costs Act, 1842 (5 & 6 Vict. c. 97). In the main these various provisions have been repealed and replaced by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), which, so far as is material for the present purpose, provides as follows :—

Public Authorities Protection Act, 1893, s. 1.

Protection of persons acting in execution of statutory or other public duty.

"Where after the commencement of this Act [January 1, 1894] any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect :

"(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof.

. . . . .

"This section shall not affect any proceedings by any department of the Government against any local authority or officer of a local authority.

S. 2. Repeal.

> "There shall be repealed as to the United Kingdom so much of any public general Act as enacts that in any proceeding to which this Act applies.
>
> . . . . . .
>
> "(*b*) The proceeding is to be commenced within any particular time;
>
> . . . . . .
>
> "and in particular there shall be so repealed the enactments specified in the schedule to this Act to the extent in that schedule mentioned."

The Act also dispenses, so far as relates to acts done in pursuance of public general Acts, with the requirement of notice of action, and in proceedings falling within its scope, it allows solicitor and client costs to successful defendants. Here we are only concerned with its special limitation upon actions and other proceedings; but in considering whether this limitation is applicable, authorities upon the older statutes as to notice of action, and upon the present statute as to solicitor and client costs, are relevant and will be referred to. As to the statutes repealed, *vide infra*, p. 401.

Section I.—Proceedings to which the P. A. P. A., 1893, applies.

Injunction.

The former statutes did not apply to proceedings for an injunction, mainly upon the ground that in such proceedings notice of action could not be reasonably required: *Flower* v. *Low Leyton Local Board* (1877), 5 C. D. 347, C. A.; *Sellors* v. *Matlock Bath Local Board* (1885), 14 Q. B. D. 928; or to proceedings in which damages were given in lieu of an injunction: *Chapman & Co.* v. *Auckland Union* (1889), 23 Q. B. D. 294, C. A. But the Act of 1893 is subject to no such limitation, and it extends to actions in the Chancery Division and elsewhere in which an injunction is claimed: *Harrop* v. *Ossett Corporation*, [1898] 1 Ch. 525; *Holford* v. *Acton District Council*, [1898] 2 Ch. 240; *Fielding* v. *Morley Corporation*, [1899] 1 Ch. 1, C. A.; [1900] A. C. 133; or a declaration equivalent to an injunction: *Grand Junction Waterworks Co.* v. *Hampton District Council* (1899), 15 T. L. R. 412.

Tort.

Under the former law the protection was not available in actions founded on contract, express or implied. It was restricted to actions founded on tort: *Davies* v. *Mayor of Swansea*

(1853), 8 Ex. 808; and among such actions were included those which were in substance founded on tort, though the plaintiff waived the tort and sued in *assumpsit*; as where the action was for the recovery of money improperly demanded in purported exercise of statutory powers: *Waterhouse* v. *Keen* (1825), 4 B. & C. 200; *Davis* v. *Curling* (1845), 8 Q. B. 286; *Midland Railway Co.* v. *Withington Local Board* (1883), 11 Q. B. D. 788, C. A. It extended to an action to recover a penalty for non-performance of a statutory duty, apparently because this was akin to tort: *Lewis & Son* v. *Swansea Corporation*, W. N. (1887), p. 234; but not to an action to recover a penalty against a member of a local authority for acting when he was disqualified: *Charlesworth* v. *Rudyard* (1835), 1 C. M. & R. 896. Penalty.

The above rule excluding actions on contract has been adopted in the application of the Act of 1893. The Act does not apply to actions for the price of goods sold and delivered; it deals with cases of some wrong by a public authority: *per* Romer, L.J., in *Milford Docks Co.* v. *Milford Haven District Council* (1901), 65 J. P. 483, C. A. Similarly an action for wrongful dismissal is founded on breach of contract of service, and is not within the statute: *Clarke* v. *Lewisham District Council* (1902), 19 T. L. R. 62; *cf. National Telephone Co.* v. *Kingston-upon-Hull Corporation* (1903), 1 L. G. R. 777. And a public body is not entitled to the benefit of the Act in an action by a builder to recover the cost of extra work done under a contract, notwithstanding that the contract was entered into in pursuance of a statutory duty: *Sharpington* v. *Fulham Guardians*, [1904] 2 Ch. 449. An action by a passenger on a municipal tramway in respect of injuries received is founded on tort, and not on contract, notwithstanding the issue of a ticket to the passenger, though possibly it might be otherwise if the ticket was issued on special conditions: *Lyles* v. *Southend Corporation*, [1905] 2 K. B. 1, C. A. In accordance with *Waterhouse* v. *Keen* (*supra*), an action to recover improvement expenses unlawfully charged by a local authority is in substance founded on tort, and is within the Act: *Cree* v. *St. Pancras Vestry*, [1899] 1 Q. B. 693. Contract excluded.

Under the former statutes the statutory protection did not apply to an action to recover land: *Foat* v. *Mayor of Margate* (1883), 11 Q. B. D. 299; or to a claim for compensation under the Lands Clauses Act, 1845; *Delaney* v. *Metropolitan Board of* Other actions excluded.

Works (1869), L. R. 3 C. P. 111. These authorities seem to apply to the Act of 1893. And, as in *Charlesworth* v. *Rudyard* (*supra*), the statutory protection does not extend to an action against a person for acting in a corporate office when disqualified: *Humphriss* v. *Worwood* (1895), 64 L. J. Q. B. 437; or to proceedings for a *Quo warranto*: *Rex* v. *Carter* (1904), 68 J. P. 466. Since the Act applies only to actions brought against a person, it does not extend to an Admiralty action *in rem*: *The Burns*, [1907] P. 137, C. A.

Crown proceedings.

The Act extends to any "action, prosecution, or other proceeding," and, as regards persons and matters falling with it, it applies to applications for a mandamus, prohibition, or certiorari, and to criminal proceedings; and in such cases *Reg.* v. *Mayor of Sheffield* (1871), L. R. 6 Q. B. 652 (*infra*, p. 410) is not now applicable.

Section II.—Persons in whose Favour Protection is given.

Persons and corporations performing statutory duties.

The phrase "against any person," which occurs in sect. 1, was frequently found in the earlier statutes, though some of them were restricted to specified classes of persons, such as magistrates (Justices Protection Act, 1848), or members of local authorities, or their officers, or persons acting in their aid: Public Health Act, 1875, s. 264. In the Act of 1893 it is used generally, and any restriction on the scope of the statute must be sought elsewhere. It includes, of course, corporations, and the statute applies in favour both of local authorities and of their officers acting under their direction: *Greenwell* v. *Howell*, [1900] 1 Q. B. 535, C. A. It also applies in favour of any person performing a statutory duty, such as a doctor giving notification of infectious disease: *Salisbury* v. *Gould* (1904), 68 J. P. 158; and to a volunteer officer in command of a regiment: *Wilson* v. *Mackay* (1905), 5th Ser. Sess. Cas. vii. 168.

Protection formerly given to contractors.

Under some of the earlier Acts the statutory protection was available for contractors executing works for their own private gain under contract with, and under the superintendence of, a local authority. This was so under sect. 139 of the Public Health Act, 1848 (*Newton* v. *Ellis* (1855), 5 E. & B. 115), but not under the Public Health Act, 1875: *Stringer* v. *Barker*, W. N. (1879), p. 127. And while only officials were protected by sect. 108 of the Metropolitan Building Act, 1855 (*Williams* v. *Golding*

(1865), L. R. 1 C. P. 69), the Metropolitan Management Amendment Act, 1862, s. 106, protected not only officials, but any person acting under their directions, whether a person executing works for his own benefit under the authority of an inspector: *Chambers* v. *Reid* (1866), 13 L. T. 703; or a contractor executing works for the local authority: *Poulsum* v. *Thirst* (1867), L. R. 2 C. P. 449; though not a person performing sanitary works on his own account in compliance with notice from the local authority: *Doust* v. *Slater* (1869), 10 B. & S. 400.

Companies working for private profit and contractors now excluded.

The title of the Act of 1893 refers to persons "acting in the execution of statutory and other public duties," and this has been accepted as an indication that the statute is to be correspondingly restricted: see *Fielding* v. *Morley Corporation*, [1899] 1 Ch. 1, C. A.; *Fenton* v. *Thorley & Co.*, [1903] A. C. p. 447. It has been held, accordingly, that it does not extend to companies exercising statutory powers for purposes of profit, or to contractors to public authorities. Thus it does not apply to railway and other companies which exercise statutory powers for their own private gain: *The Ydun*, [1899] P. 236, at p. 239, C. A.; *Att.-Gen.* v. *Margate Pier Co.*, [1900] 1 Ch. 749; *English* v. *Metrop. Water Board* (1907), 71 J. P. 313; or to a company which carries on a statutory undertaking as lessee of a municipal authority: *Lyles* v. *Southend Corporation*, [1905] 2 K. B. 1, C. A., see p. 20. Nor does it apply to contractors doing, for their own gain under contract with a local authority, work which the local authority is by statute authorized to do: *Kent County Council* v. *Folkestone Corporation*, [1905] 1 K. B. 620, C. A.; *Tilling (Ltd.)* v. *Dick, Kerr & Co.*, [1905] 1 K. B. 562. Nor does it protect trustees of a statutory loan fund as regards the relation of *trustee* and *cestui que trust* existing between them and the members: *O'Brien* v. *Mitchelstown Loan Fund*, [1903] 1 I. R. 282, C. A.

Member of public exercising statutory powers.

Under some of the earlier statutes, such as the Larceny Act, 1861, members of the public were empowered to exercise statutory powers of a public nature, such as the apprehension of persons found committing specified offences. Such powers are scarcely distinguishable from duties, and it is probable that persons exercising them would be within the protection of the present statute; but the point has not been decided. If the Act of 1893 does not apply, then recourse can still be had to the earlier statutes.

Section III.—The Matters in respect of which Protection is given.

(1) *Acts done in pursuance of a Statute.*

Act must be in intended pursuance of statute.

The Act of 1893 relates to proceedings "for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority." The earlier Acts referred simply to acts done *in execution of* an office (Justices Protection Act, 1848, replacing 24 Geo. 2, c. 44); or *in pursuance of* the Act (Game Act, 1831; Larceny Act, 1861); or *in pursuance of or under the authority of* the Act (Highway Act, 1835; Cruelty to Animals Act, 1849). Later statutes referred to *anything done or intended to be done* (Metropolitan Building Act, 1855; Metropolitan Management Amendment Act, 1862), or to *anything done or intended to be done, or omitted to be done* under the provisions of the Act (Public Health Act, 1875).

The fuller form on which the words of the P. A. P. A., 1893, are based, was introduced into the Army Act, 1881. In fact, however, it seems to be no more efficacious than the original short form "in pursuance of the Act," as that was interpreted by the Courts. The statutory protection "is intended for the benefit of persons who intend to act right, but by mistake act wrong": *Parton* v. *Williams* (1820), 3 B. & A. 330; *Hughes* v. *Buckland* (1846), 15 M. & W. 346, *per* Pollock, C.B. In other words, a statute which protects persons acting in pursuance of it necessarily refers to intended pursuance: see *Oakley* v. *Kensington Canal Co.* (1833), 5 B. & Ad. 138, *per* Parke, J.; *Reid* v. *Coker* (1853), 13 C. B. 850, *per* Maule, J. And after some difference of opinion it was settled that the statutory protection applied to omissions, although not expressly mentioned: *Wilson* v. *Mayor of Halifax* (1868), L. R. 3 Ex. p. 119; *Jolliffe* v. *Wallasey Loc. Bd.* (1873), L. R. 9 C. P. 62; *Holland* v. *Northwich High. Bd.* (1876), 34 L. T. 137. Thus the form of words now adopted appears to have no more effect than when protection was simply given in respect of acts done "in pursuance of" a statute.

Former test was *bonâ fide* belief in statutory

Under the former statutes various tests were suggested for determining when a defendant was entitled to protection. At first a *bonâ fide* belief that he was exercising statutory powers

was considered to be sufficient: *Graves* v. *Arnold* (1812), 3 Camp. 242; *Theobald* v. *Crichmore* (1818), 1 B. & A. 227. But this was found to allow of too much laxity. "It would," said Williams, J., in *Cann* v. *Clipperton* (1839), 10 A. & E. 582, "be wild work if a party might give himself protection by merely saying that he believed himself acting in pursuance of a statute. The case to which [the statutes] refer must lie between a mere foolish imagination and a perfect observance of the statute." An obvious way of striking this mean was to require that the belief in statutory authority must be not only *bonâ fide*, but based upon reasonable ground: see *Cook* v. *Leonard* (1827), 6 B. & C. 351; and it was natural to conclude that the defendant must be aware of the specific statutory provision under which he claimed to have acted: *Kine* v. *Evershed* (1847), 10 Q. B. 143, *per* Lord Denman, C.J., at p. 150; *cf. Smith* v. *Hopper* (1847), 9 Q. B. 1005. But neither of these doctrines finally prevailed. It was held that it was not necessary that the defendant should, at the time of doing the act complained of, be cognizant of the existence of the statute: *Hardwick* v. *Moss* (1861), 7 H. & N. 136; and the reasonableness of his belief in statutory authority was rejected as an independent test, though it might be an ingredient in *bona fides: Horn* v. *Thornborough* (1849), 3 Ex. 846, *per* Rolfe, B., at p. 850; *Booth* v. *Clive* (1851), 10 C. B. 827; *Arnold* v. *Hamel* (1854), 9 Ex. 404, *per* Parke, B.

power on reasonable grounds.

The necessary check upon the defendant's assumption of statutory power was finally found in the requirement that he should have a *bonâ fide* belief in facts which, if they had existed, would have afforded a justification under the statute. This test, first formulated in *Hermann* v. *Seneschal* (1862), 13 C. B. N. S. 392, was repeated in *Roberts* v. *Orchard* (1863), 2 H. & C. 769, and was adopted as a practical solution of the difficulty: see *Heath* v. *Brewer* (1864), 15 C. B. N. S. 803; *Chambers* v. *Reid* (1866), 13 L. T. 703; *Downing* v. *Capel* (1867), L. R. 2 C. P. 461. After an apparent reversion to the requirement of reasonable belief in *Leete* v. *Hart* (1868), L. R. 3 C. P. 322, the new test was re-affirmed by Willes, J., in *Chamberlain* v. *King* (1871), L. R. 6 C. P. 474; see also *Griffith* v. *Taylor* (1876), 2 C. P. D. 194, C. A.; and it has not since been doubted. The question of *bona fides* is not, as suggested in *Arnold* v. *Hamel* (1854), 9 Ex. 404, a preliminary question for the judge, but a substantial question of fact to be left to the jury: *Hazeldine* v. *Groves*

Test is belief in facts giving statutory power.

(1842), 3 Q. B. 997; *Cox* v. *Reid* (1849), 13 Q. B. 558. Most of these cases were decided on the Larceny Act, 1861, s. 113.

Authority conferred on a class.

Where a statute confers authority to do an act upon a specified class of persons, the defendant, to obtain statutory protection, must purport to act in pursuance of the statute, and also to act in the required character. It was formerly held that he must actually fill such character: *Hopkins* v. *Crowe* (1836), 4 A. & E. 774; *Lidster* v. *Borrow* (1839), 9 A. & E. 654. But the question in such cases is really the same as in the others above referred to—Did the defendant *bonâ fide* believe in the facts necessary to give him authority, one of these facts being, that he filled the necessary character; and hence it is sufficient if he has a *bonâ fide* belief that he fills the character: *Huggins* v. *Wady* (1846), 15 M. & W. 357; *Hughes* v. *Buckland* (1846), 15 M. & W. 346; *Horn* v. *Thornborough* (1849), 3 Ex. 846. And the same rule applies to a person who purports to act as a member of a local authority. He is entitled to protection if he acted as a member under a *bonâ fide* belief that he was so, although his election was invalid: *Lea* v. *Facey* (1887), 19 Q. B. D. 352, C. A.

Act must be directly connected with statutory duty.

To entitle the defendant to protection the act complained of must be directly connected with a statutory authority or duty. It was refused where a local authority had detained the goods of the plaintiff in respect of a debt alleged to be due from him: *Affleck* v. *Mayor of Keighley* (1886), 2 T. L. R. 864, C. A. Where a local authority under their statutory powers supplied water-carts for watering the streets, and a person was injured through a defect in a water-cart, they were entitled to protection: *Edwards* v. *Vestry of St. Mary, Islington* (1889), 22 Q. B. D. 338, C. A.; but, under a statute entitling a contractor under a local authority to protection, the contractor was not protected in respect of the negligence of his servant in a matter merely collateral to the performance of the statutory duty: *Whatman* v. *Pearson* (1868), L. R. 3 C. P. 422. Where the act is directly connected with a statutory duty, the defendant does not lose protection because it is in fact unauthorized; as where water is taken from a prohibited source: *Gaby* v. *Wilts and Berks Canal Co.* (1815), 3 M. & S. 580; where a trespass is committed in raising a party wall to comply with a Building Act: *Pratt* v. *Hillman* (1825), 4 B. & C. 269; where a dock-master gives directions as to berthing a ship in excess of his powers: *Smith* v. *Shaw* (1829),

10 B. & C. 277; or where a local authority improperly cover in a watercourse for the purpose of making a sewer: *Wheatcroft* v. *Matlock Local Board* (1885), 52 L. T. 356. But there must be statutory authority to which the act might be referred: *Walsh* v. *Southwark Borough Council* (1908), 72 J. P. 71.

Railway companies established under special Acts which give privileges as regards litigation, cannot claim these privileges in regard to their liability as carriers, whether of goods: *Palmer* v. *Grand Junction Railway Co.* (1839), 4 M. & W. 749; or of passengers: *Carpue* v. *London and Brighton Railway Co.* (1844), 5 Q. B. 747. The special Act does not compel them to be common carriers; it only enables them to be so, so far as they should think fit; and when they have elected to become so, they are liable in that character in the same way as other common carriers. Railway companies.

(2) *Acts done in the Execution of a Public Office.*

Previously to the P. A. P. A., 1893, there was no general statutory provision protecting persons acting in the execution of a public office, but magistrates were protected by the Justices Protection Act, 1848. Usually public officers act under specific statutory authority, but whether this is so or not, their claim to protection under the P. A. P. A., 1893, does not differ from that of a private person who acts in intended pursuance of a statute. They are entitled to the statutory protection if they have a *bonâ fide* belief in facts which would justify their conduct. In special circumstances an officer may be entitled to act on mere suspicion: *Wedge* v. *Berkeley* (1837), 6 A. & E. 663; *Burns* v. *Nowell* (1880), 5 Q. B. D. 444. But a mere belief by a magistrate that he has authority to make a particular order is not enough; he must believe in facts which would give him the authority: see *Agnew* v. *Jobson* (1877), 47 L. J. M. C. 67. If a magistrate in fact acts in execution of his office, the circumstance that he is acting maliciously does not disentitle him to protection: *Kirby* v. *Simpson* (1854), 10 Ex. 358. But a public officer is disentitled by the improper receipt of money: *Irving* v. *Wilson* (1791), 4 T. R. 485; *cf. Morgan* v. *Palmer* (1824), 2 B. & C. 729. Belief in facts conferring authority.

A constable acting under a warrant was entitled to protection notwithstanding an honest mistake, as where he seized the goods of the wrong person (*Parton* v. *Williams* (1820), 3 B. & A. 330), or exceeded his authority: *Theobald* v. *Crichmore* Constables.

(1818), 1 B. & A. 227; *Freegard* v. *Barnes* (1852), 7 Ex. 827; see *Smith* v. *Wiltshire* (1821), 5 Moo. 322. But when not acting under a warrant, he had, like a private person, to prove a *bonâ fide* belief in facts giving him authority: *Graves* v. *Arnold* (1812), 3 Camp. 242; *Cook* v. *Leonard* (1827), 6 B. & C. 351; *Gosden* v. *Elphick* (1849), 4 Ex. 445.

Magistrates.

But though magistrates had to show a *bonâ fide* belief in facts conferring authority, yet if the matter in which they purported to act was in fact within their jurisdiction, they did not forfeit protection by reason of excess or irregularity of jurisdiction: *Weller* v. *Toke* (1808), 9 East, 364; *Prestidge* v. *Woodman* (1822), 1 B. & C. 12; *Hazeldine* v. *Groves* (1842), 3 Q. B. 997. And this rule was laid down with regard to public officers generally by Bayley, J., in *Cook* v. *Leonard* (*ubi sup.* at p. 353). And similarly, if a public officer is carrying out a purpose which is authorized by statute, and intends to act under statutory authority, he is entitled to protection notwithstanding that he does not act strictly in accordance with the statute. On this the leading case is *Selmes* v. *Judge* (1871), L. R. 6 Q. B. 724, where the defendants, who were surveyors of highways, made a rate under a repealed statute instead of under the Highways Act, 1835. "They intended," said Blackburn, J., "to act according to the duties of their office as surveyors, although they mistook the legal mode of carrying out their intention": see *Greenway* v. *Hurd* (1792), 4 T. R. 553; *Boothby* v. *Morton* (1822), 3 Br. & B. 239; *Norris* v. *Smith* (1839), 10 A. & E. 188; *Hardwick* v. *Moss* (1861), 7 H. & N. 136; and *The Johannesburg*, [1907] P. 65; *Eliot* v. *Allen* (1845), 1 C. B. 18, *contra*, is not now law.

Highway surveyors.

Slander in course of public duty.

Upon a narrow construction of the Justices Protection Act, 1848, it was decided by the Court of Appeal in *Royal Aquarium Society* v. *Parkinson*, [1892] 1 Q. B. 431, that a slander spoken in the course of public duty was not "anything done" within the meaning of the Act. The contrary has been held in Ireland: *Murray* v. *M'Swiney* (1876), Ir. R. 9 C. L. 545.

Rule under P. A. P. A., 1893.

The above principles are applicable to the general protection which is given by the P. A. P. A., 1893, to persons acting in the intended execution of any public duty or authority; and whether the duty is cast upon an officer by the common law or by statute, the test of his title to protection is in either case the same. The mere *bonâ fide* belief that he has power to do

the act complained of is not enough; he must believe in facts which would give him the power if they existed. One of these facts is the validity of his own appointment, and hence irregularity in the appointment of an officer, if unknown to him, does not deprive him of protection: *Lea* v. *Facey* (1887), 19 Q. B. D. 352, C. A. And if the subject-matter is within the officer's jurisdiction or power, he is not deprived of protection because of some excess or irregularity in its exercise: *Cook* v. *Leonard* (1827), 6 B. & C. p. 353; or because the statutory provisions are not strictly followed: *Selmes* v. *Judge* (1871), L. R. 6 Q. B. 724.

(3) *Local Authorities.*

Municipal undertakings.

Local authorities who are exercising their ordinary statutory authority are entitled to the protection of the Act; as in the assertion of a public right of way: *Greenwell* v. *Howell*, [1900] 1 Q. B. 535, C. A.; *Offin* v. *Rochford District Council*, [1906] 1 Ch. 342; or in the use of land for burial purposes: *Toms* v. *Clacton District Council* (1898), 46 W. R. 629. And although commercial companies acting for private gain are excluded from the Act (*supra*, p. 391), yet it applies to undertakings of a commercial nature carried on under statutory powers by local authorities who are bound to apply any profits in relief of the rates: see as to piers and harbours: *The Ydun*, [1899] P. 236, C. A.; as to electric lighting: *Chamberlain and Hookham (Ltd.)* v. *Bradford Corporation* (1900), 83 L. T. 518; *Jeremiah Ambler & Sons (Ltd.)* v. *Bradford Corporation*, [1902] 2 Ch. 585, C. A.; as to tramways: *Parker* v. *London County Council*, [1904] 2 K. B. 501; *Lyles* v. *Southend Corporation*, [1905] 2 K. B. 1, C. A. Previously to 1893 this was not so: *Ongley* v. *Chatham Local Board* (1887), 4 T. L. R. 6, C. A. It has been pointed out that railway companies are not protected to the same extent: *supra*, p. 395. In *Lyles* v. *Southend Corporation* the Court of Appeal distinguished the railway cases on the ground that a municipal corporation, having obtained statutory powers to carry on a tramway, is also under a duty to carry it on. The protection extends to a public body, such as the Tyne Improvement Commission, who perform a duty in the interest of the public, and not for any person's private gain: *The Johannesburg*, [1907] P. 65.

Section IV.—The Period of Limitation under the P. A. P. A., 1893.

Six months from the act, etc., complained of, or from cessation of continuing injury.

An action or other proceeding which falls within the statute must be commenced "within six months next after the act, neglect, or default complained of, or, in case of a continuing injury or damage, within six months after the ceasing thereof." Under the previous statutes various forms of limitation were used: "after the fact committed" (Highway Act, 1835; Larceny Act, 1861; and other statutes); "after the act complained of shall have been committed" (Justices Protection Act, 1848); "after the accruing of the cause of action" (Metropolitan Building Act, 1855; Public Health Act, 1875). In local statutes authorizing the taking of land and construction of works, it was usual to provide for the case of continuing damage, and then the six months was reckoned after the damage had ceased: see *Fraser* v. *Swansea Canal Co.* (1834), 1 A. & E. 354, on a canal Act of 1794; *Carpue* v. *London and Brighton Railway Co.* (1844), 5 Q. B. 747, on a railway Act of 1837. The full form of words, providing for continuance of injury, was introduced into the Army Act, 1881, and subsequently into the P. A. P. A., 1893.

"Act complained of."

Time runs from "the act complained of." The ascertainment of this date is usually easy. In an action for trespass by pulling down fences in assertion of an alleged public right of way, it is the pulling down of the fences: *Offin* v. *Rochford District Council*, [1906] 1 Ch. 342. In cases of wrongful distress and sale, time runs as against an owner not in possession—as where the distress is on barges in the possession of a lessee (*Fraser* v. *Swansea Canal Co.* (1834), 1 A. & E. 354)—from the sale and not from the distress; and the same rule has been applied as regards an owner in possession, since the seizure is only conditional until sale: *Collins* v. *Rose* (1839), 5 M. & W. 194. But in such a case the distress would seem to furnish a sufficient cause of action. In an action against a magistrate for damages for distress for a fine illegally imposed, the six months runs from the distress, and not from the conviction: *Polley* v. *Fordham*, [1904] 2 K. B. 345. But in favour of a county court bailiff, the statute runs from his default, not from the resulting injury: *Turley* v. *Daw* (1906), 94 L. T. 216.

Accrual of cause of action.

When the cause of action depends on the happening of special damage, it accrues when the damage happens, and not at the time of the act which causes it: *Backhouse* v. *Bonomi*

(1858), 9 H. L. C. 503 (*supra*, p. 205); and under the former statutes "the fact committed" was referred to the same date—that is, it was equivalent to "the accrual of the cause of action": *Roberts* v. *Read* (1812), 16 East, 215, on the Highway Act (13 Geo. 3, c. 78), s. 81; *Gillon* v. *Boddington* (1824), Ry. & M. 161, on the London Dock Act (39 & 40 Geo. 3, c. 47), s. 151; see *Whitehouse* v. *Fellowes* (1861), 10 C. B. N. S. 765. But in case of trespass the cause of action accrues when the trespass is committed. Where a surveyor of highways, acting under the former of the statutes just referred to, wrongfully encroached upon private property by building a wall, time ran from the commencement of the building, since the separation of the land, and consequently the encroachment, was then complete: *Wordsworth* v. *Harley* (1830), 1 B. & Ad. 391. *Cf. Coggins* v. *Bennett* (1877), 2 C. P. D. 568.

Continuing injury.

In the above cases the damage, whether it follows the act which causes it immediately or after an interval, is at once complete, and, when this is so, there is no continuance of damage or injury within the meaning of the statute. The effect of the damage may continue, but this does not extend the time of limitation. Thus where excavation causes the walls of a house to crack, the continuance of the cracks does not constitute for this purpose a continuance of damage: *Lloyd* v. *Wigney* (1830), 6 Bing. 489. Similarly in the case of bodily injury, the injury is complete when the accident happens, and is not a continuing injury because the suffering continues: *Carey* v. *Mayor of Bermondsey* (1903), 67 J. P. 111. "The words 'continuance of injury or damage' do not mean or refer to a damage inflicted once and for all which continues unrepaired, but to a new damage recurring day by day in respect of an act done, it may be once and for all at some prior time, or repeated, it may be, from day to day": *per* Buckley, J., in *Harrington* v. *Corporation of Derby*, [1905] 1 Ch. 205; see *Hague* v. *Doncaster Rural Dist. Council* (1908), *Times*, Dec. 2.

Cases of continuance of damage following upon a single act occur when from a completed excavation there follows a continuing subsidence: *Crumbie* v. *Wallsend Local Board*, [1891] 1 Q. B. 503, C. A.; or where cracks in the walls of a house get continuously worse: *Fairbrother* v. *Bury Rural Sanitary Authority* (1889), 37 W. R. 544. Cases of repeated acts, accompanied by continuously recurring damage, occur where a wrongful

obstruction of a road (*Wilkes* v. *Hungerford Market Co.* (1835), 2 Bing. N. C. 281), or a pollution of a river (*Harrington* v. *Corporation of Derby* (*supra*, p. 399)), is continued from day to day; see *Kennet and Avon Canal Co.* v. *Great Western Railway Co.* (1845), 7 Q. B. 824. Wrongful imprisonment has been treated on this footing, each day being regarded as forming a new imprisonment: *Bailey* v. *Warden* (1815), 4 M. & S. 400; *Hardy* v. *Ryle* (1829), 9 B. & C. 603. But there is no continuance of damage where the injury takes place at successive intervals, although the cause of injury is continuing: *Blakemore* v. *Glamorganshire Canal Co.* (1829), 3 Y. & J. 60. In *English* v. *Metrop. Water Board* (1907), 71 J. P. 313, the question of continuance of injury was not considered: see 5 L. G. R. p. 394, note.

In cases of continuance of damage, damages were formerly recoverable for six months (or other the time specially limited) before the action, unless the statute made the period of limitation run, in case of continuance of damage, from its cessation. Under the P. A. P. A., 1893, the six months runs from the cessation of the damage, and if the action is brought within that time, the ordinary period of limitation applies, and damages are recoverable for six years before the action: *Harrington* v. *Corporation of Derby*, [1905] 1 Ch. 205.

Six months' limitation overrides other special limitation.

The six months' limitation under the Act of 1893 applies also in favour of public authorities in cases where the action is otherwise subject to a special limitation. Thus in a case under the Fatal Accidents Act, 1846, which requires the action to be commenced within twelve months after the death of the deceased, this period is reduced to six months: *Markey* v. *Tolworth Joint Hospital Board*, [1900] 2 Q. B. 454. There is no continuous damage after his death of which his widow can take advantage. And since she can only maintain an action which the deceased could have maintained, she is barred if more than six months have elapsed between the accident and the death: *Williams* v. *Mersey Docks, etc., Board*, [1905] 1 K. B. 804, C. A. The statute is not impliedly repealed by the Locomotives Act, 1898, which provides a limitation of twelve months in an action by a highway authority to recover extraordinary expenses: *Kent County Council* v. *Folkestone Corporation*, [1905] 1 K. B. 620, C. A.

Local and personal Acts.

Protection similar to that provided by public general Acts previously to the P. A. P. A., 1893, was conferred by many local and personal Acts, such as railway, canal, and town

improvement Acts. The provisions of these Acts were so various that it was found necessary to replace them by uniform rules. This was done by the Limitation of Actions and Costs Act, 1842 (5 & 6 Vict. c. 97), which, as regards limitation, introduced for local and personal Acts a uniform period of two years, or, in case of continuing damage, one year from its cessation: sect. 5. The Act was confined in its operation to statutes then existing: *Boden* v. *Smith* (1849), 11 L. J. C. P. 121; but since that date the practice of introducing provisions of this kind appears to have considerably diminished. Before the introduction of the present system of printing public general Acts and local and personal Acts separately, there was no clear distinction between these classes of statutes. An Act establishing a local court was held to be a local Act: *Cock* v. *Gent* (1843), 12 M. & W. 234; and also an Act for establishing a harbour: *Moore* v. *Shepherd* (1854), 10 Ex. 424, affirmed as *Shepherd* v. *Sharp* (1856), 1 H. & N. 115. The Metropolitan Police Acts were public general Acts: *Barnett* v. *Cox* (1847), 9 Q. B. 617; but see *Moore* v. *Shepherd*.

Repeal of limitations in former public Acts as regards proceedings within P. A. P. A., 1893.

Sect. 2 of the Act of 1893 repealed so much of any public general Act as provided, in any proceeding to which the Act of 1893 applied, for, *inter alia*, a special limitation; and in particular the sections of statutes mentioned in the schedule were to this extent repealed. The schedule enumerates some 108 statutes. Sects. 8 (limitation) and 9 (notice of action) of the Justices Protection Act, 1848, were omitted, but they were repealed by the Statute Law Revision Act, 1894. Other omissions were: the Habitual Drunkards Act, 1879, with its limitation of two years; the Army Act, 1881, with its limitation of one year (sect. 170); and the Submarine Telegraph Act, 1885, with the like limitation. The Army Annual Act, 1894, substituted a six months' limitation, and this subsists as an independent enactment; but the relevant parts of the other statutes just mentioned, and also any other omitted sections of public general Acts, are repealed to the extent indicated—that is, so far as they relate to proceedings to which the P. A. P. A., 1893, applies. In *Bryson* v. *Russell* (1884), 14 Q. B. D. 720, C. A., it was held that constables were not entitled to protection in regard to acts done in pursuance of statutes subsequent to 1 & 2 Will. 4, c. 41; and in *Graham* v. *Mayor of Newcastle*, [1893] 1 Q. B. 643, C. A., the three months' limitation in favour of surveyors of highways under the Highway Act, 1835, was held to apply to urban

authorities who had been constituted surveyors of highways under the Public Health Act, 1875, s. 144. Both these decisions are rendered obsolete by the P. A. P. A., 1893.

Scope of P. A. P. A., 1893.

Speaking generally, sect. 1 of the Act of 1893 covers the same ground as the previous public general statutes which conferred protection in respect of acts done in pursuance of them, and the repeal of this earlier protection is practically complete. But there is a tendency to confine the Act of 1893 to public authorities and their servants, whereas under the earlier statutes —such as the Game Act, 1831, and the Larceny Act, 1861— private individuals purporting to exercise powers were entitled to protection; *supra*, p. 391. If these individuals are excluded from the Act of 1893, then the earlier statutes are kept alive for their benefit. In addition to the possible variation in the period of limitation, this would have the important result that notice of action would be necessary. Where, however, an individual is performing a statutory duty, the P. A. P. A., 1893, applies: *Salisbury* v. *Gould* (1049), 68 J. P. 158 (*supra*, p. 390).

How far limitations under local and personal Acts retained.

Sect. 1 of the Act of 1893 makes no distinction between public general statutes and local and personal statutes, and it would apply to acts done by a public authority in pursuance of a statute of the latter class. But local and personal statutes are usually obtained in the interest of commercial undertakings, and since the Act of 1893 does not apply to commercial companies (*supra*, p. 391), such statutes would seem to be but little affected by the Act. A public authority, however, of a non-commercial nature, if acting under a local statute, would be entitled to the benefit of sect. 1, and the two years' limitation for local and personal Acts passed prior to 1842 would be reduced to six months. The two years' limitation, though applying to local and personal statutes, is contained in a public general statute —the Act of 1842, s. 5—and, so far as regards actions falling within sect. 1, it is repealed by the general provision of sect. 2 of the P. A. P. A., 1893, notwithstanding that the schedule only specifically repeals the section of the Act of 1842—sect. 2— relating to costs.

Defendants, who are entitled to the benefit of the statute, do not forfeit the right to plead it merely because they have negotiated with the plaintiff, and his claim has been thereby delayed: *Hewlett* v. *London County Council* (1908), 72 J. P. 136. Hence a claimant who is negotiating should nevertheless issue a writ.

CHAPTER IX.

CRIMINAL AND CROWN PROCEEDINGS AND PROCEEDINGS BEFORE JUSTICES.

SECTION I.—CRIMINAL PROCEEDINGS.

Limitations.

APART from statute there is no limitation upon the time within which criminal proceedings can be commenced: *Reg.* v. *Hull* (1860), 2 F. & F. 16, *per* Pollock, C.B., *Dover* v. *Maester* (1803), 5 Esp. 92. As regards the following offences a statutory time limit exists:—

Offence.	Statute.	Time Limit.
High treason (except attempting the assassination of the King, or treason committed on the high seas, or in a foreign country)	The Treason Act, 1695 (7 & 8 Will. 3, c. 3), s. 5 Scotland: The Treason Act, 1708 (7 Anne, c. 21) (see Foster, C.C. 249) Ireland: The Treason (Ireland) Act, 1821 (1 & 2 Geo. 4. c. 24)	Indictment must be found by the grand jury within three years next after the offence committed
Treason felony by words spoken	The Treason Felony Act, 1848 (11 Vict. c. 12), s. 4	Information on oath, within six days after words spoken; and warrant issued within ten days after information
Blasphemous libels	9 & 10 Will. 3, c. 32 (9 Will. 3, c. 35, in Revised Edition), s. 2	No prosecution under the Act for words spoken unless information given before justices within four days after words spoken, and prosecution within three months after information
Rioters remaining after proclamation	1 Geo. 1, st. 2, c. 5, s. 8	Prosecution for an offence must be commenced within twelve months after the offence committed

Offence.	Statute.	Time Limit.
Assisting prisoners to escape	16 Geo. 2, c. 31, s. 4	Prosecution must be commenced within one year after the offence committed
Unlawful training to arms	The Unlawful Drilling Act, 1819 (60 Geo. 3, and 1 Geo. 4, c. 1), s. 7	Prosecution to be commenced within six calendar months after the offence committed
Night poaching	The Night Poaching Act, 1828 (9 Geo. 4, c. 69), s. 4 The Night Poaching Act, 1844 (7 & 8 Vict. c. 29)	Prosecution (otherwise than by summary proceedings) to be commenced within twelve calendar months after the commission of the offence
Counterfeiting trade-marks	Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 15.	Action or proceeding for recovering penalty, or for procuring conviction of offender, not to be commenced after three years after commission of offence, or one year after discovery thereof by party proceeding
Offence in respect of registration of births and deaths	Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88), s. 46	Prosecution on indictment must be commenced within three years after the commission of the offence
Customs offences	Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 257	Suits, indictments, or informations in any Court or before any justice to be brought or exhibited within three years after the offence committed. This provision, like that of the Consolidation Act of 1853 (16 & 17 Vict. c. 107), s. 303, is more general than the previous enactments in 3 & 4 Will. 4, c. 3, s. 120, and 8 & 9 Vict. c 87, s 134, and *Reg.* v. *Thompson* (1851), 16 Q. B. 832, where it was held that an indictment at Assizes was excluded, is not now applicable
Offence against girl between 13 and 16	Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 5	Prosecution not to be commenced more than three months after the commission of the offence
Offence under the Municipal Corporations Act, 1882	Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), sect. 219	In summary proceedings for offences and fines the information must be laid within six months after the commission of the offence. Fines not recoverable summarily are recoverable by action in the High Court
Offence against Post Office	Post Office Act, 1908, s. 70	Proceeding in High Court for fine or forfeiture to be commenced within one year after offence

Offence.	Statute.	Time Limit.
Corrupt or illegal practice— I. At Parliamentary elections	Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 51	Proceeding to be commenced within one year after offence committed, or, if an election inquiry held, within one year after offence committed, or within three months after report, whichever period last expires: with a maximum of two years after the offence committed. This applies also to proceedings under the Summary Jurisdiction Acts. The issue of the summons or other process is the commencement of the proceeding where service is evaded: otherwise the service is the commencement
II. At local government elections— Boroughs County Councils District and Parish Councils	Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), s. 30: extended to County Councils by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 75; and to District and Parish Councils by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 48	Same limitation as under the Corrupt and Illegal Practices Prevention Act. 1883
City of London	The Act of 1884, s. 35	,,
Parliamentary election petition	Parliamentary Election Act, 1868 (31 & 32 Vict. c. 125), s. 6 Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 40	Petition to be presented within twenty-one days after the return, to the proper officer—clerk of the Crown in England, clerk of the Crown and Hanaper in Ireland—of the member to whose election the petition relates. But where the petition is based on an allegation of an illegal practice, the petition, so far as respects such illegal practice, may be presented, (*a*) at any time before the expiration of fourteen days after the receipt by the returning officer of the statement of election expenses; (*b*) if a payment of money or other act subsequent to such return is specifically alleged, then at any time within twenty-eight days after such payment or act The return to the Clerk of the Crown means the receipt by him of the petition within business hours: *Hurdle* v. *Waring* (1874), L. R. 9 C. P. 435

Offence.	Statute.	Time Limit.
Local government election petitions— Boroughs County Councils District and Parish Councils City of London	Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 73, 88: extended to County Councils by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 75; to District and Parish Councils by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 48; to the City of London by the Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), s. 35	Petition to be presented within twenty-one days after the day of election; but if founded on corrupt practices, with specific allegation of payment of money or other reward made or promised since the election, within twenty-one days after the date of the alleged payment or promise. But an election is valid unless questioned within twelve months, though this does not exempt from liability to penalties for acting without qualification: *De Souza* v. *Cobden*, [1891] 1 Q. B. 687

Commencement of prosecution.

Under statutes which require the prosecution to be commenced within the time limited, the statute is checked when the information is laid before a magistrate and the warrant issued: *R.* v. *Willace* (1797), 1 East, P. C. 186; *R.* v. *Brooks* (1847), 2 C. & K. 402; 1 Den. 217; *R.* v. *Austin* (1845), 1 C. & K. 621. But the information must be given in evidence. In the absence of this, the warrant is not evidence that the proceedings have been commenced within the time limited: *R.* v. *Parker* (1864), Leigh & C. 459; 33 L. J. M. C. 135; *cf. R.* v. *Phillips* (1818), R. & R. C. C. R. 369. And the information only stops the statute for the purpose of proceedings in respect of the offence alleged in it: *R.* v. *Casbolt* (1869), 11 Cox, 385. If an indictment is preferred in time and is ignored, a further indictment cannot be preferred after the time for the same offence. In *R.* v. *Killminster* (1835), 7 C. & P. 228, this appears to have been doubted. If the first warrant is not executed, and a subsequent warrant for the same offence is issued after the statutory period, an indictment founded on the second warrant is too late: *R.* v. *Hull* (1860), 2 F. & F. 16.

Criminal information.

A criminal information lies for misdemeanors only, and only in gross cases; and, in a case of libel, only at the suit of persons in a public office or position: *Reg.* v. *Labouchere* (1884), 12 Q. B. D. 320; it lies against a magistrate for any illegal act committed by him from corrupt or vindictive motives. It must be applied for "within a reasonable time after the offence

complained of": Crown Office Rules, 1906, r. 37. This rule is in accordance with the former practice. In cases against magistrates, it was held that, if the offence complained of took place in vacation, the application must be made in the next term: *R.* v. *Harries* (1811), 13 East, 270; *R.* v. *Bishop* (1822), 5 B. & A. 612; if in term time, then either in that term or the next: *R.* v. *Smith* (1796), 7 T. R. 80; *R.* v. *Marshall* (1811), 13 East, 322. As to other persons, see *R.* v. *Robinson* (1764), 1 W. Bl. p. 542; *R.* v. *Jollie* (1833), 4 B. & Ad. 867; *R.* v. *O'Meara* (1823), 4 B. & Ad. 869 n.; *R.* v. *Satirist* (1834), 3 N. & M. 532. The present rule operates in effect in the same way, notwithstanding the abolition of terms by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 26: *College of Christ* v. *Martin* (1877), 3 Q. B. D. 16; see *R.* v. *Hartley* (1825), 4 B. & Ad. 869 n.; but a criminal information against a magistrate or other person for any act done in the execution of a public office is also subject to a six months' limitation under the Public Authorities Protection Act, 1893: *supra*, p. 395.

Section II.—Crown Proceedings.

Quo warranto.

An information in the nature of a writ of *quo warranto* is the modern substitute for the writ of *quo warranto*. Originally twenty years was the limit beyond which the Court would not disturb the peaceable possession of a franchise: *Winchelsea Causes* (1766), 4 Burr. 1962. The effort in *R.* v. *Wardroper* (1767), 4 Burr. 2024, to reduce this to six years failed. But as regards municipal offices the statute 32 Geo. 3, c. 58, introduced a limitation of six years reckoned from the unlawful assumption of the corporate office. Under sect. 1 the defendant might plead that he had held the office for six years before the exhibiting of the information, and the plea, if proved, was valid; but sect. 2 allowed the prosecutor to reply any forfeiture, surrender, or avoidance by the defendant of his office or franchise within the six years. The six years was reckoned before the filing of the information, and hence the rule absolute for the information must have been obtained in time for the information to be filed within the six years: *Reg.* v. *Harris* (1840), 5 A. & E. 518; see *R.* v. *Stokes* (1813), 2 M. & S. 71.

Municipal office.

A shorter limitation in respect of municipal offices was

introduced by the Municipal Corporations Act, 1837 (1 Vict. c. 78), s. 23, and is now contained in the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50). Sect. 225 provides that an application for an information in the nature of *quo warranto* against any person holding a corporate office shall not be made after the expiration of twelve months from the time when he became disqualified after election. For disqualification at election the procedure is by election petition: *supra*, p. 406. The disqualification arising under sect. 12 from interest under a contract with the corporation arises *de die in diem*, and the twelve months runs from the end of the contract: *Reg.* v. *Francis* (1852), 18 Q. B. 526. Where the disqualification arises from ceasing to occupy the qualifying premises, so that the councillor is no longer entitled to be on the burgess list, the twelve months runs from the date of the ceasing to occupy, and not from his being struck off the list: *Ex parte Birkbeck* (1874), L. R. 9 Q. B. 256.

Six years' limitation.

In consequence of sect. 225 of the Municipal Corporations Act, 1882, the limitation of 32 Geo. 3, c. 58, became unnecessary, and the statute was repealed by the Act of 1882 as to boroughs within that Act (Sched. I. Part II.), and by the Statute Law Revision Act, 1887 (50 & 51 Vict. c. 59), it was repealed altogether. The limitation of the statute 32 Geo. 3, c. 58, was also applied by way of analogy to informations *quo warranto* other than those in respect of a municipal office; see *Reg.* v. *Harris* (1840), 11 A. & E. 518, where it was applied to the franchise of free mines in Cornwall: Short and Mellor's Crown Office Practice, 2nd. ed. p. 183; and the plea of the six years' limitation is applicable generally to informations *quo warranto*. This is recognized by rule 124 of the Crown Office Rules, 1906, which, as under the statute, allows the prosecutor to reply any forfeiture, surrender, or avoidance by the defendant within the six years. Moreover the Court, in the exercise of its discretion, may impose a further limit; or, at least, lapse of time short of the six years may be a ground for refusing the rule for an information: see *R.* v. *Wardroper* (1767), 4 Burr. 2024. And in general, in the case of an annual office, on which no title to any other depends, the rule will not be granted if it cannot result in a judgment within the year: *Reg.* v. *Hudson* (1842), 4 Q. B. 648, n. (*b*); *Reg.* v. *Anderson* (1842), 2 G. & D. 113; but see *Reg.* v. *Francis* (1852), 18 Q. B. 526.

Certiorari.

A writ of *certiorari* to remove an order made by justices, or by general or quarter sessions, must be applied for within six calendar months after the order: Crown Office Rules, 1906, r. 21. This rule re-enacts the rule of 13 Geo. 2, c. 18, s. 5, which was repealed by 51 Vict. c. 3: see *R.* v. *Boughey* (1791), 4 T. R. 281; *R.* v. *Bloxam* (1834), 1 A. & E. 386. In case of an appeal to sessions and a confirmation of the order, the six months runs from the confirmation: *Re Kaye* (1822), 1 D. & R. 436; *R.* v. *Justices of Middlesex* (1836), 5 A. & E. 626; see *Elliott* v. *Thompson* (1875), 33 L. T. 339. Where sessions confirm the order subject to a case, and the case is abandoned, the order becomes final at the end of six months from the confirmation, and cannot be again confirmed with a variation by a subsequent sessions: *Reg.* v. *Justices of Staffs* (1857), 7 E. & B. 935. Where an order is made at sessions subject to a case, the six months runs from the order notwithstanding delay in settling the case: *R.* v. *Justices of Sussex* (1813), 1 M. & S. 631, 734; *R.* v. *Bloxam* (1834), 1 A. & E. 386; *Elliott* v. *Thompson* (1875), 33 L. T. 339. Under the statute there was no power to enlarge the time: *R.* v. *Bloxam*; though in case of delay the Court would grant a mandamus to enter continuances and hear the appeal: *R.* v. *Justices of Suffolk* (1832), 1 D. P. C. 163. But now the Court or a judge has power to enlarge the time: C. O. R., 1906, r. 259; R. S. C., 1883, Ord. 64, r. 7. A special case stated by general or quarter sessions for obtaining the judgment of the High Court on an order at sessions cannot be filed after the expiration of six calendar months from the making of the order, except by leave of the Court on special circumstances shown before or after the expiration of such six months: C. O. R., 1906, r. 25.

Time of application.

The application for a *certiorari* will be in time if the affidavits are left at chambers within the six months, although, by reason of the non-attendance of the judge, it is not in fact made till later: *Reg.* v. *Allan* (1864), 4 B. & S. 915; see *R.* v. *Inhabitants of Abergele* (1836), 5 A. & E. p. 796, n. (*a*); *Reg.* v. *St. Mary, Whitechapel* (1843), 2 Dowl. N. S. 964; C. O. R., 1906, r. 20. Where the judge indorsed the summons, "No order, without prejudice to any application to the Court," a subsequent application was an independent proceeding, and was out of time when made after the six months, although the application to the judge was made within the six months: *R.* v. *Hodson* (1863),

9 L. T. 290. If the *certiorari* is granted on insufficient affidavits, the writ cannot be supported by affidavits filed after the six months: *Reg.* v. *Inhabitants of Gilberdyke* (1843), 5 Q. B. 207; see *Reg.* v. *Inhabitants of Cartworth* (1843), 5 Q. B. 201; nor can a new writ be then moved for: *Reg.* v. *Inhabitants of Cartworth* (1844), 8 Jur. 61; unless, of course, the time is extended. But an irregularity not affecting the application can be cured after the time: *R.* v. *Inhabitants of Abergele* (1836), 5 A. & E. 795.

P. A. P. A., 1893.

Apparently the six months' limitation of C. O. R., 1906, r. 21, does not apply to a *certiorari* to remove an indictment found at quarter sessions: *R.* v. *Battams* (1801), 1 East, 298; nor does it bind the Crown: S. C. p. 303, n. (*d*). And as to other cases of *certiorari* than the removal of orders of justices there was, until the Public Authorities Protection Act, 1893, no general rule of practice requiring the application to be made within six months. The Court judged of the reasonableness of the application, looking at the circumstances of the particular case: *Reg.* v. *Mayor of Sheffield* (1871), L. R. 6 Q. B. 652; see *Reg.* v. *Commissioners of Sewers for the Tower Hamlets* (1843), 5 Q. B. 357. But an application for a *certiorari* appears to be a proceeding for an act done in execution of a public office, and is subject to the six months' limitation of the P. A. P. A., 1893: *supra*, p. 395.

Other limitations on *certiorari*.

In addition to the foregoing limitations, certain proceedings for *certiorari* are specially limited. Thus a *certiorari* in respect of the determination of boundaries of parishes and manors by the Inclosure Commissioners (now the Board of Agriculture and Fisheries), under the Inclosure Act, 1845 (8 & 9 Vict. c. 118), must be applied for within six months after the publication of the boundaries (sects. 39, 44); and a *certiorari* in respect of an order, rule, or regulation of the Poor Law Commissioners or the Poor Law Board (now the Local Government Board: 34 & 35 Vict. c. 70, s. 2) must, under the Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), s. 13, be applied for within twelve months after the day when a copy is sent as required by statute. Under R. S. C., 1883, Ord. 64, r. 14, an application to set aside an award may be made at any time before the last day of the sittings next after the award has been made and published to the parties, though the time can be extended under rule 7: *Re Oliver & Scott's Arbitration* (1889), 43 C. D. 310.

The limitation applies to an award under the Lands Clauses Act, 1845: *Re Harper* (1875), 20 Eq. 39; and the same limit is imposed on *certiorari* to bring up the verdict of a jury: *R.* v. *Sheward* (1880), 9 Q. B. D. 741, C. A. Under the Valuation of Property (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 40, a *certiorari* for questioning a decision of justices in assessment sessions had to be sued out within three months of the decision. Possibly this is now extended to six months by C. O. R., 1906, r. 21.

Mandamus.

There is no general statutory limitation upon an application for a mandamus, but the Court will not entertain it unless it is brought within a reasonable time. In *R.* v. *Stainforth and Keadby Canal Co.* (1813), 1 M. & S. 32, an application in 1813 to compel a canal company to proceed to assessment of lands taken in 1799 was too late; in *R.* v. *Cockermouth Inclosure Commissioners* (1830), 1 B. & Ad. 376, a like result attended an application in 1829 to compel inclosure commissioners to amend allotments set out in 1817. In *Reg.* v. *Leeds and Liverpool Canal Co.* (1840), 11 A. & E. 316, an application to compel the company to enrol contracts for the purchase of land was refused after the company had been in possession of the lands for 65 years. But a mandamus to compel the holding of a local court has been granted after 200 years: *R.* v. *Corporation of Wells* (1836), 4 Dowl. 562.

A mandamus for the correction of parish burgess lists under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), must be applied for within two months after the last sitting of the Revision Court: sect. 47. An application for a writ of mandamus to justices to enter continuances and hear an appeal must be made within two calendar months after the first day of the sessions at which the refusal to hear took place, unless further time is allowed by the Court or a judge, or unless special circumstances appear by affidavit to account for the delay to the satisfaction of the Court: C. O. R., 1906, r. 68. As to mandamus to a local authority to levy a rate, see Lumley's Public Health, 7th ed. p. 482.

The times fixed by the C. O. R, 1906, may be enlarged or abridged by the Court or a judge upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed: R. S. C., 1883, Ord. 64, r. 7; C. O. R., 1906, r. 259.

Section III.—Proceedings before Magistrates.

In certain cases the time within which proceedings can be taken before justices is specially limited:—

Cruelty to animals.

A complaint under the Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92) must be made "within one calendar month after the cause of complaint has arisen": sect. 14. This period is exclusive of the day on which the offence is committed, and hence an information laid on 30th June in respect of an act committed on May 30 was in time: *Radcliffe* v. *Bartholomew*, [1892] 1 Q. B. 161; *cf. Hardy* v. *Ryle* (1829), 9 B. & C. 603; *Williams* v. *Burgess* (1840), 12 A. & E. 635.

Offence under Municipal Corporations Act, 1882.

In summary proceedings for offences and fines under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), the information must be laid within six months after the commission of the offence. Fines not recoverable summarily may be recovered by action in the High Court: sect. 219.

Merchant Shipping Act, 1894.

A summary proceeding to obtain a conviction or an order for payment of money under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), must be commenced within six months after the commission of the offence or after the cause of complaint arises, as the case may be; or, if both or either of the parties to the proceeding happen during that time to be out of the United Kingdom, in the case of a summary conviction within two months, and in the case of a summary order within six months, after they both first happen to arrive, or to be at one time, within the United Kingdom: sect. 683 (1). This provision excludes other limitations on summary proceedings, except proceedings to which the Public Authorities Protection Act, 1893, applies: sect. 683 (3), (4).

Factories.

In the case of summary proceedings for offences and fines under the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), sect. 146 provides that the information must be laid within three months after the date at which the offence comes to the knowledge of the inspector for the district within which the offence is charged to have been committed; or, in case of an inquest being held in relation to the offence, then within two months after the conclusion of the inquest, so, however, that it be not laid after the expiration of six months from the commission of the offence. Under sect. 135 it is an offence punishable

by fine if the provisions as to the fencing of machinery in a factory are not observed; and under sect. 136 the occupier of a factory is liable to a fine if any person suffers bodily injury in consequence of the occupier having neglected to observe any provision of the Act. These sections create distinct offences, and time runs against a summons under sect. 136 from the time of the injury coming to the knowledge of the inspector, not from the time of the fact of the machinery being unfenced coming to his knowledge: *R.* v. *Taylor*, [1908] 2 K. B. 237.

General six months' limitation.

Where no time is specially limited, summary proceedings before justices are subject, in England to a six months' limitation under the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11; and in Ireland to the same limitation under the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), s. 10 (4), except as in the section mentioned; that is, except proceedings for rates and taxes, as to which no limit is imposed; claims for wages, hire, or tuition, as to which the period is one year; and claims in respect of trespass, as to which it is two months. The English Act applies where an information is laid before a justice that a person has committed an offence within his jurisdiction for which he is liable to summary conviction; or where complaint is made to a justice upon which he has authority to make an order for the payment of money or otherwise; and it enacts as follows:—

Summary Jurisdiction Act, 1848, s. 11.

> "In all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information laid within six calendar months from the time when the matter of such complaint or information respectively arose."

This limitation does not apply to proceedings for enforcing a rate by the mere issue of a warrant of distress, since this involves no order for the payment of money: *Sweetman* v. *Guest* (1868), L. R. 3 Q. B. 262; nor to cases of continuing liability, as maintenance cases: *Ulverstone Guardians* v. *Park* (1889), 53 J. P. 629; *cf. Westropp* v. *Public Works Commissioners*, [1896] 2 I. R. 93, on the limitation in the Fisheries (Ireland) Act, 1850 (13 & 14 Vict. c. 88).

Improvement Expenses.

Expenses of improvement works.

Under the Public Health Act, 1875 (38 & 39 Vict. c. 55), and analogous statutes a local authority has power, either in the first instance, or on default by the owner, to execute improvement works, and to recover the expenses from the owner or occupier by summary proceedings before justices: see sects. 23, 36, and 41, as to drainage; sect. 62, supply of water; sect. 150, expenses of paving, etc., private streets; Private Streets Works Act, 1892 (55 & 56 Vict. c. 57), s. 12. Under the Summary Jurisdiction Act, 1848 (*supra*, p. 413), such proceedings are subject to a six months' limitation.

In general the amount recoverable is fixed by the notice of apportionment, and after service of this notice three months is allowed for disputing it: see *Sandgate Local Board* v. *Keene*, [1892] 1 Q. B. 831, C. A.; and on the ground that the three months ought not to be counted in reckoning the six months' limitation, it was originally held that the proceedings must be brought within nine months of the notice of apportionment: *Jacomb* v. *Dodgson* (1863), 9 B. & S. 461, on the corresponding provisions of the Public Health Act, 1848 (11 & 12 Vict. c. 63), and Local Government Act, 1858 (21 & 22 Vict. c. 98); and see *per* Lush, J., in *Wilson* v. *Mayor of Bolton* (1871), L. R. 7 Q. B. 105, at p. 111; as to the law prior to the Act of 1858 see *Eddlestone* v. *Francis* (1860), 7 C. B. N. S. 568.

Time runs from notice of demand.

But the starting-point for the six months is not the date of the liability being ascertained, but of the service of the notice of demand (sect. 257 of the Public Health Act, 1875), though if this is served before the three months for disputing the apportionment have elapsed, such three months or the unexpired part are to be excluded: *Grece* v. *Hunt* (1877), 2 Q. B. D. 389; *Marr* v. *Greenwich Board of Works* (1880), 44 J. P. 424.

Thus, if the notice of demand is served after the three months, the proceedings must be taken within six months of the service of the notice of demand: if it is given before, the time runs from the end of the three months. Or perhaps the notice of demand is not valid unless given after the expiration of the three months, in which case the period would always be six months from the notice of demand: *West Derby Local Board* v. *Bell* (1878), 42 J. P. 812; *Simcox* v. *Handsworth Local Board* (1881), 8 Q. B. D. 39; *Re Bettesworth and Richer's Contract* (1888), 37 C. D. 535. An irregular notice, if invalid, may be followed

by a valid notice, and time then runs from the date of the latter notice: *Sykes* v. *Mayor of Huddersfield* (1871), 35 J. P. 614.

Under the Metropolis Management Acts, 1855 (18 & 19 Vict. c. 120) and 1862 (25 & 26 Vict. c. 102), the six months runs from the service of notice of demand notwithstanding delay in serving such notice: *Wortley* v. *St. Mary, Islington* (1886), 51 J. P. 166; and where there has been an arrangement for payment by instalments, time runs as against each instalment from demand for that instalment, notwithstanding a previous demand for the whole sum: *Prescott* v. *Nicholson* (1889), 60 L. T. 563. And as regards the expense of pulling down dangerous structures under the former of these Acts time runs from demand of payment, and not from the incurring of the expense: *Labalmondiere* v. *Addison* (1858), 1 E. & E. 41.

Substitution of county court.

The local authority are restricted to the procedure prescribed by the statute. The relation of debtor and creditor is not created so as to enable them to prove as ordinary creditors in an administration action: *West* v. *Dowman* (1880), 14 C. D. 111, C. A. And though under sect. 261 of the Public Health Act, 1875, demands under fifty pounds which are recoverable summarily may also be recovered in the county court, yet these proceedings are merely substituted for those before the justices, and are subject to the same limitation of six months: *West Ham Local Board* v. *Maddams* (1876), 33 L. T. 809; *Tottenham Local Board* v. *Rowell* (1876), 1 Ex. D. 514, C. A.

Option to proceed summarily or by action.

Where, on the other hand, a local Act gives the local authority the option of either proceeding summarily before justices or of recovering the amount by action, the six months' limitation applies only to the proceedings before justices: *Mayor of Blackburn* v. *Sanderson*, [1902] 1 K. B. 794, C. A.; *cf. Mayor of Leeds* v. *Robshaw* (1887), 51 J. P. 441; and the action is limited either to six years under the statutes of James, or more probably to twenty years, as being brought on a specialty debt: *Hampstead Corporation* v. *Caunt*, [1903] 2 K. B. p. 3, n. (5).

It is the same with regard to expenses incurred by a local authority under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), in obtaining a nuisance order and carrying it into effect. Under sect. 11 these may be recovered either summarily, or in the county court, or in the High Court, and since the various procedures are optional, the six months' limitation applies only to the summary proceedings: *Mayor of Blackburn* v.

Sanderson (*supra*), overruling *Hammersmith Vestry* v. *Lowenfeld*, [1896] 2 Q. B. 278. Moreover, they are recoverable as money paid. Hence the statute runs from the incurring of the expenses, and apparently the period of limitation for an action is six years.

Paving expenses under the Metropolis Management Act, 1855, s. 105, and the Metropolis Management Act, 1862, s. 77, in addition to being recoverable summarily, are recoverable by action against succeeding owners, and demand against the owner for the time being is necessary to give a cause of action against him. Such action is therefore barred in six years—or more probably twenty years—from the demand: *Hampstead Corporation* v. *Caunt*, [1903] 2 K. B. 1, p. 3, n. (5).

Charge on land.

The six months' limitation does not apply to a charge on property under the Public Health Act, 1875, s. 257: *Tottenham Local Board* v. *Rowell* (1888), 15 C. D. 378, C. A.; *Corporation of Sunderland* v. *Alcock* (1882), 51 L. J. Ch. 546. The limitation is twelve years from the completion of the work: *Hornsey Local Board* v. *Monarch Building Society* (1889), 24 Q. B. D. 1, C. A.

Erection of buildings.

Sect. 75 of the Metropolis Management Act, 1862 (25 & 26 Vict. c. 102), (*i*) forbids the erection of buildings beyond the building line, and under sect. 107 no penalty is recoverable unless the complaint before the justices is made within "six months after the commission or discovery of" the offence. As to time of discovery, see *Metropolitan Board of Works* v. *Lathey* (1884), 49 J. P. 245. This applies only to the recovery of pecuniary penalties (*Bermondsey Vestry* v. *Johnson* (1871), L. R. 8 C. P. 441), though in *Brutton* v. *St. George's, Hanover Square* (1871), L. R. 13 Eq. 339, it was extended to an order for the removal of buildings. Such an order, however, is limited by sect. 11 of the Summary Jurisdiction Act, 1848 (*supra*, p. 413), and under that section the complaint must be made within six months after the offence is complete: *Morant* v. *Taylor* (1876), 1 Ex. D. 188.

Moreover, the offence is complete when the building first projects beyond the building line, although the architect's certificate as to the building line has not then been given: *London County Council* v. *Cross* (1892), 66 L. T. 731, C. A.; *Hull* v. *London County Council*, [1901] 1 Q. B. 580. Though where an offence is continuing, and a penalty is recoverable in respect of the continuing offence, it is recoverable for six

(*i*) Repealed: see now the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.).

months before the summons: *London County Council* v. *Worley*, [1894] 2 Q. B. 826, on the Metropolis Management Act, 1862, ss. 85, 107; *Rumball* v. *Schmidt* (1882), 8 Q. B. D. 603, on sect. 156 of the Public Health Act, 1875, now sect. 3 of the Public Health Act, 1888; *Metropolitan Board of Works* v. *Anthony & Co.* (1884), 54 L. J. M. C. 39, on the Metropolis Management Act, 1882, s. 13; *Reg.* v. *Slade*, [1895] 2 Q. B. 247, on the Public Health (London) Act, 1891, s. 5 (9); and see *Reay* v. *Mayor of Gateshead* (1886), 34 W. R. 682.

The limitation will be observed by the magistrates in any proceeding before them, and the High Court has no jurisdiction to restrain the institution of proceedings on the ground that the period of limitation has expired: *Kerr* v. *Corporation of Preston* (1876), 6 C. D. 463.

Application of six months' limitation.

The six months' limitation under the Summary Jurisdiction Act, 1848, applies to the recovery of claims determinable by justices under sect. 140 of the Railway Clauses Act, 1845 (8 Vict. c. 20), and consequently to the recovery of water rates under £20, which, by virtue of sects. 74 and 85 of the Waterworks Clauses Act, 1847 (10 Vict. c. 17), are recoverable under sect. 140 of the Railway Clauses Act, 1845. Such sums are civil debts within the Summary Jurisdiction Act, 1879, and the limitation on summary proceedings by complaint applies to them: *East London Waterworks Co.* v. *Charles* (1894), 42 W. R. 702. And the same limitation in the Petty Sessions (Ireland) Act, 1851 (*supra*, p. 413), applies to proceedings before justices by the treasurer of a loan society to recover the amount due on promissory notes under the Charitable Loan Societies (Ireland) Act, 1843 (6 & 7 Vict. c. 91): *Atthill* v. *Woods*, [1903] 2 I. R. 305; *R.* v. *Justices of Fermanagh*, [1904] 2 I. R. 18, C. A.; see *O'Reilly* v. *Connor*, [1904] 2 I. R. 601, p. 604.

Compensation not over £50.

But it is otherwise as to compensation awarded by justices under sect. 22 of the Lands Clauses Act, 1845, on claims not exceeding £50, for lands compulsorily taken or injuriously affected. The adjudication is not an order for payment of money under the Summary Jurisdiction Act, 1848, and the summons to hear and determine the question of compensation is not out of time if issued after six months from the notice to treat: *Reg.* v. *Hannay* (1874), 44 L. J. M. C. 27; nor need the summons be issued within six months of the claim arising: *Reg.* v. *Edward* (1884), 13 Q. B. D. 586, C. A., overruling *Re Edmundson* (1851), 17 Q. B. 67.

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APPENDIX.

STATUTES.

(*The figures in the margin refer to the pages in the text.*)

(31 Eliz. c. 5, s. 5.)

An Act concerning Informers.

5. All actions, suits, bills, indictments or informations which, after twenty days after the end of this session of Parliament, shall be had, brought, sued or exhibited for any forfeiture upon any statute penal, made or to be made, whereby the forfeiture is or shall be limited to the Queen, her heirs or successors only, shall be had, brought, sued or exhibited within two years next after the offence committed or to be committed against such Act penal, and not after two years; and all actions, suits, bills or informations, which after the said twenty days shall be had, brought, sued or commenced, for any forfeiture upon any penal statute, made or to be made, except the Statute of Tillage, the

Limitation of actions on penal statutes: two years for the Crown, and one year for a *qui tam* informer.

[p. 240.]

benefit and suit whereof is or shall be by the said statute limited to the Queen, her heirs or successors, and to any other which shall prosecute in that behalf, shall be had, brought, sued or commenced, by any person that may lawfully pursue for the same as aforesaid, within one year next after the offence committed or to be committed against the said statute; and in default of such pursuit, then the same shall be had, sued, exhibited or brought, for the Queen's Majesty, her heirs or successors, at any time within two years after that year ended; and if any action, suit, bill, indictment or information for any offence against any penal statute, made or to be made, except the Statute of Tillage, shall be brought after the time in that behalf before limited, then the same shall be void and of none effect, any Act or statute made to the contrary notwithstanding.

Except where a shorter time is expressly limited.

Provided always that where any action, information, indictment or suit is or shall be limited, by any statute penal, to be had, sued, commenced or brought within shorter time than is afore rehearsed, that in every such case the action, information, indictment or other suit shall be brought within the time limited by such statute.

[*So much of this Act as relates to the time limited for exhibiting an information for a forfeiture upon any penal statute is repealed by the Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 36.]

(21 Jac. 1, c. 14).

An Act to admit the Subject to plead the general issue in Informations of Intrusion.

On informations for intrusions on Crown lands, whereof the King hath been out of possession for twenty years, the defendant may plead the general issue, and retain possession till title found for the King.

Where the King out of his prerogative royal may inforce the subject in informations of intrusion brought against him to a special pleading of his title, the King's most excellent Majesty, out of his gracious disposition towards his loving subjects, and at their humble suit being willing to remit a part of his ancient and regal power, is well pleased that it be enacted, and be it enacted, etc. :—

1. Whensoever the King, his heirs or successors, and such from or under whom the King claimeth, and all others claiming under the same title under which the King claimeth, hath been or shall be out of possession by the space of twenty years, or hath not or shall not have taken the profits of any lands, tenements or hereditaments within the space of twenty years before any information of intrusion brought or to be brought to recover the same, in every such case the defendant or defendants may plead the general issue, if he or they so think fit, and shall not be pressed to plead specially, and in such cases the defendant or defendants shall retain the possession he or they had at the time of such information exhibited, until the title be tried, found, or adjudged for the King.

[p. 142.]

2. Where any information of intrusion may fitly and aptly be brought on the King's behalf, no *scire facias* shall be brought whereunto the subject shall be forced to a special pleading, and be deprived of the grace intended by this Act.

Scire facias shall not be brought instead of information.

(15 CAR. 1, c. 1.)

The Statute for Ireland is in the same terms.

THE LIMITATION ACT, 1623

(21 JAC. 1, c. 16, ss. 3, 4, AND 7).

An Act for Limitation of Actions and for avoiding of Suits in Law.

3. All actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action *sur trover*, and replevin for taking away of goods and cattle, all actions of account and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rents, and all actions of assault, menace, battery, wounding and imprisonment, or any of them, which shall be sued or brought at any time after the end of this present session of Parliament shall be commenced and sued within the time and limitation hereinafter expressed, and not after: (that is to say) the said actions upon the case (other than for slander), and the said actions for account, and the said actions for trespass, debt, detinue and replevin for goods or cattle, and the said action of trespass *quare clausum fregit*, within three years next after the end of this present session of Parliament, or within six years next after the cause of such actions or suit and not after; and the said actions of trespass, of assault, battery, wounding, imprisonment or any of them, within one year next after the end of this present session of Parliament, or within four years next after the cause of such actions or suit, and not after; and the said actions upon the case for words, within one year after the end of this present session of Parliament, or within two years next after the words spoken and not after.

Limitation of time within which certain personal actions shall be brought, viz.:—

[p. 190.]

Actions on the case, account, trespass, replevin, etc., within six years.

Assaults, etc., within four years.

For words within two years.

4. And, nevertheless, be it enacted that if in any of the said actions or suits judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint, writ or bill, or if any the said actions shall be brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry, that in all such cases the party plaintiff, his heirs, executors or administrators, as the case shall require,

In case of reversal of judgment for error, etc., new action may be brought within one year.

[p. 198.]

may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after.

Infants, etc., may bring such personal [p. 290.] actions within the several periods after their disability ceases.

7. Provided, nevertheless, that if any person or persons that is or shall be entitled to any such action of trespass, detinue, action *sur trover*, replevin, actions of accounts, actions of debts, action of trespass for assault, menace, battery, wounding or imprisonment, actions upon the case for words, be or shall be at the time of any such cause of action given or accrued, fallen or come, within the age of twenty-one years, *feme covert, non compos mentis*, imprisoned or beyond the seas, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited after coming to or being of full age, discovert, of sane memory, at large and returned from beyond the seas, as other persons having no such impediment should have done.

(4 & 5 Anne, c. 3, ss. 17, 18, and 19.)

An Act for the Amendment of the Law and the better Advancement of Justice.

Limitations of suits for seamen's wages. [p. 245.]

17. All suits and actions in the Court of Admiralty for seamen's wages, which shall become due after the said first day of Trinity term [*i.e.* in 1706] shall be commenced and sued within six years next after the cause of such suits or actions shall accrue and not after.

Proviso for plaintiffs in respect of infancy, etc., in such suits. [p. 291.]

18. Provided nevertheless that if any person or persons who is or shall be entitled to any such suit or action for seamen's wages be or shall be at the time of any such cause of suit or action accrued, fallen or come, within the age of twenty-one years, *feme covert, non compos mentis*, imprisoned or beyond the seas, that then such person or persons shall be at liberty to bring the same actions so as they take the same within six years next after their coming to or being of full age, discovert, of sane memory, at large and returned from beyond the seas.

And for defendants beyond seas in such suits, and also in actions of trespass, detinue, etc. [p. 293.]

19. If any person or persons against whom there is or shall be any such cause of suit or action for seamen's wages, or against whom there shall be any cause of action of trespass, detinue, action *sur trover*, or replevin for taking away goods or cattle, or of action of account or upon the case or of debt grounded upon any lending or contract without specialty, of debt for arrearages of rent, or assault, menace, battery, wounding and imprisonment or any of them, be or shall be at the time of any such cause of suit or action given or accrued, fallen or come, beyond the seas, that then such person or persons who is or shall be entitled to any such suit or action shall be at liberty to bring the said actions against such person and persons after their return from beyond the seas [so as they take the same after their return from beyond the

seas (*a*)] within such times as are respectively limited for the bringing of the said actions before by this Act and by the said other Act made in the one-and-twentieth year of the reign of King James the First.

THE CROWN SUITS ACT, 1769

(9 GEO. 3, c. 16).

An Act to amend and render more effectual an Act made in the Twenty-first Year of the Reign of King James the First, intituled "An Act for the general Quiet of the Subjects against all Pretences of Concealment whatsoever."

The Nullum Tempus Act.

PREAMBLE recites 21 Jac. 1, c. 2: And whereas the said Act is now by efflux of time become ineffectual to answer the good end and purpose of securing the general quiet of the subjects against all pretences of concealment whatsoever:

The Crown shall not sue or implead any person for any manors, lands, or hereditaments, etc., where the right hath not or shall not first accrue and grow within sixty years next before the commencing such suit, etc.;

[p. 143.]

1. The King's Majesty, his heirs or successors, shall not at any time hereafter sue, impeach, question, or implead any person or persons, bodies politic or corporate, for or in anywise concerning any manors, lands, tenements, rents, tithes, or hereditaments whatsoever (other than liberties or franchises), or for or in anywise concerning the revenues, issues, or profits thereof, or make any title, claim, challenge, or demand of, in, or to the same or any of them, by reason of any right or title which hath not first accrued and grown, or which shall not hereafter first accrue and grow, within the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof, unless his Majesty, or some of his progenitors, predecessors, or ancestors, heirs or successors, or some other person or persons, bodies politic or corporate, under whom his Majesty, his heirs or successors, any thing hath or lawfully claimeth or shall have or lawfully claim, have or shall have been answered, by force and virtue of any such right or title to the same, the rents, revenues, issues, or profits thereof, *or the rents, issues, or profits of any honour, manor, or other hereditament whereof the premises in question shall be part or parcel* (*b*) within the said space of sixty years, *or that the same have or shall have been duly in charge to his Majesty, or some of his progenitors, predecessors, or ancestors, heirs, or successors, or have or shall have stood insuper of record, within the said space of sixty years.* (*b*)

(*a*) Interlined on the roll.
(*b*) Repealed in effect by the Crown Suits Act, 1861, *infra*, p. 452.

and the subject secured in the free and quiet enjoyment thereof, as well against the Crown, etc.

[p. 147]

And all and every person or persons, bodies politic and corporate, their heirs and successors, and all claiming by, from, or under them or any of them, for and according to their and every of their several estates and interests which they have or claim to have or shall or may have or claim to have in the same respectively, shall at all times hereafter quietly and freely have, hold, and enjoy, against his Majesty, his heirs and successors, claiming by any title which hath not first accrued or grown or which shall not hereafter first accrue or grow within the said space of sixty years, all and singular manors, lands, tenements, rents, tithes, and hereditaments whatsoever (except liberties and franchises) which he or they, or his or their or any of their ancestors or predecessors, or those from, by, or under whom they do or shall claim, have or shall have held or enjoyed, or taken the rents, revenues, issues, or profits thereof, by the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued or commenced, for recovering the same, or in respect thereof; unless his Majesty, or some of his progenitors, predecessors or ancestors, heirs or successors, or some other person or persons, bodies politic or corporate, by, from or under whom his Majesty, his heirs or successors, any thing hath or lawfully claimeth, or shall have or lawfully claim, in the said manors, lands, tenements, rents, tithes or hereditaments, by force of any right or title, have been or shall have been answered, by virtue of any such right or title, the rents, revenues, issues, or other profits thereof, within the said space of sixty years; *or that the same have or shall have been duly in charge, or stood insuper of record as aforesaid, within the said space of sixty years* (*a*).

[p. 147.]

And furthermore all and every person and persons, bodies politic and corporate, their heirs and successors, and all claiming or to claim by, from or under them, or any of them, for and according to their and every of their several estates and interests which they have or claim, or shall or may have or claim, respectively, shall, for ever hereafter, quietly and freely have, hold and enjoy, all such manors, lands, tenements, rents, tithes and hereditaments (except liberties and franchises) as they now have, claim or enjoy, or hereafter shall or may have, claim or enjoy, whereof his Majesty, his progenitors, predecessors or ancestors, or whereof his Majesty, his heirs or successors, or he or they by, from or under whom his Majesty, his heirs or successors, any thing hath or lawfully claimeth, or shall have or lawfully claim, or some of them, by force of some right or title to the same, have not or shall not have been answered, by virtue of such right or title, the rents, revenues, issues or profits thereof within the space of sixty years next before the filing, issuing or commencing of every such

(*a*) Repealed in effect by the Crown Suits Act, 1861, *infra*, p. 452.

action, bill, plaint, information, commission or other suit or proceeding as shall at any time or times hereafter be filed, issued or commenced, for recovering the same, or in respect thereof, *nor the same have been or shall have been duly in charge, or stood insuper of record as aforesaid, within the said space of sixty years* (*a*), against all and every person and persons, their heirs and assigns, having, claiming or pretending to have, or who shall or may have, claim or pretend to have any estate, right, title, interest, claim or demand whatsoever, of, in or to the same, by force or colour of any letters patents or grants upon suggestion of concealment or wrongful detaining, or not being in charge, or defective titles, or by, from or under any patentees or grantees, or any letters patents or grants upon suggestion of concealment or wrongful detaining, or not being in charge, or defective titles, of or for which said manors, lands, tenements, rents, tithes and hereditaments or any of them, no verdict, judgment, decree, judicial order upon hearing, or sentence of any court now standing in force, hath been had or given, or any such verdict, judgment, decree, judicial order upon hearing, or sentence of court, shall hereafter be had or given, in any action, bill, plaint or information, in any of his Majesty's courts at Westminster, for or in the name of the King's Majesty, or any of his ancestors, progenitors, predecessors, heirs or successors, or of any of the said patentees or grantees, or for their or any of their heirs or assigns, within the space of sixty years next before the filing, issuing or commencing of every such action, bill, plaint, information, commission or other suit or proceeding as shall at any time or times hereafter be filed, issued or commenced, for recovering the same, or in respect thereof as aforesaid.

as against all persons claiming any estate or interest therein, by colour of any letters patent, or grants upon suggestion of concealment, wrongful detaining, etc., for which judgment hath not or shall not be given for the Crown within sixty years before the commencing such suit.

2. Provided always, that where the rents, revenues, issues or profits of any manors, lands, tenements, tithes or hereditaments, are or shall be in charge, by, to or with any auditor or auditors, or other proper officer or officers of the revenue, such rents, revenues, issues and profits, shall be held, deemed and taken to be duly in charge within the meaning and intent of this Act; any usage or custom to the contrary notwithstanding.

In what cases the rents and profits of manors, etc., shall be deemed to be duly in charge.

[p. 144.]

3. Provided always that this Act, or any thing therein contained, shall not extend to bar, impeach or hinder his Majesty, his heirs or successors, of, for or from any manors, tenements, rents, tithes or hereditaments, whereof any reversion or remainder now is in his Majesty, for or concerning the said reversion or remainder; nor of, for, or from any reversion or remainder, or possibility of reversion or remainder, in any of his Majesty's progenitors, or predecessors or ancestors, which by the expiration, end or other determination of any limited estate of fee-simple, or of any fee-tail or other particular estate, hath or ought to have first fallen or become in possession, or which

Cases wherein reversions or remainders in the Crown, of any manor, etc., are not liable to be impeached by this Act.

[p. 148.]

(*a*) Repealed in effect by the Crown Suits Act, 1861, *infra*, p. 452.

shall or may or ought hereafter first to fall or come in possession, within the space of sixty years next before the filing, issuing or commencing of any such action, bill, plaint, information, commission or other suit or proceeding, as shall at any time or times hereafter be filed, issued or commenced for recovering the same, or in respect thereof; nor of, for or from any right or title first accrued or grown to his Majesty, or any of his progenitors, predecessors or ancestors, or which shall first accrue or grow to his Majesty, or any of his heirs or successors, of, in or to any manors, lands, tenements, rents, tithes or hereditaments, at any time or times within the space of sixty years next before the filing, issuing or commencing of any such action, bill, plaint, information, commission or other suit or proceeding as shall at any time or times hereafter be filed, issued or commenced for recovering the same, or in respect thereof, and not before.

Limitation of the Act with respect to grants from the Crown of any limited estate, etc.

[p. 149.]

4. Provided also that this Act, or anything therein contained, shall not extend to any manors, lands, tenements, rents, tithes or hereditaments, mentioned to be granted or conveyed by any of his Majesty's progenitors, predecessors or ancestors, or by any other under whom his Majesty claimeth, to any person or persons, of any limited estate in fee-simple, or of any estate in tail, or other particular estate, which several estates (if the same had been good and effectual in law), have or ought to have first fallen or become in possession, or will or ought first to fall or come in possession, within the space of sixty years next before the filing, issuing or commencing of any such action, bill, plaint, information, commission or other suit or proceeding as shall at any time or times hereafter be filed, issued or commenced for recovering the same, or in respect thereof as aforesaid; nor to any manors, lands, tenements, rents, tithes or hereditaments, mentioned to be granted or conveyed by any of his Majesty's progenitors, predecessors, or ancestors, or by any other under whom his Majesty claimeth, to any person or persons in fee-tail, or other particular estate, whereof the reversion or inheritance (if such estate tail, or other particular estate, had been good and effectual in law) should have been and continued in his Majesty, or any of his progenitors, predecessors or ancestors, or should or ought hereafter to be and continue in his Majesty, his heirs or successors, at any time within the space of sixty years next before the filing, issuing or commencing of any such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued or commenced for recovering the same, or in respect thereof as aforesaid.

The said manors, etc., to be holden of the Crown upon the usual tenures,

[p. 150.]

5. Provided also that all and singular the said manors, lands, tenements and hereditaments, shall at all times hereafter be holden of his Majesty, his heirs and successors, and of other person and persons, bodies politic and corporate, their heirs and successors respectively, by the same tenures, services, fee-farms, chief rents, heriots and other duties, to all intents and purposes as the same should or ought of right

to have been holden if the estates, rights and interests, established and made sure by this present Act, had been, before the making of this Act, firm, good, and effectual in law. services and duties.

6. Saving to every person and persons, bodies politic and corporate, their heirs and successors (other than his most excellent Majesty, his heirs and successors, and other than all patentees or grantees of concealments or defective titles, and all and every person or persons claiming from, by, or under them, or any of them, for or in respect or by reason of any such patents or grants of concealments or defective titles) all such rights, title, interest, estate, rents, commons, customs, duties, profits and other claims and demands whatsoever, in, to or out of the said manors, lands, tenements, tithes or hereditaments, as they or any of them had or ought to have had before the making of this Act; anything in this Act to the contrary notwithstanding. General reservation of rights. [p. 150.]

7. Provided also that where any fee farm rent, or other rent or rents have been or shall be answered and actually paid to the King's Majesty, or to any his predecessors, heirs or successors, within the space of sixty years next before an action, bill, plaint, information, commission or other suit or proceeding shall at any time or times hereafter be filed, issued or commenced for recovering the same, or in respect thereof, out of any manors, lands, tenements or hereditaments, of which manors, lands, tenements or hereditaments the estates, rights or interests being defective are established and made sure by this present Act, that the King's Majesty, his heirs and successors, shall from henceforth for ever have, hold and enjoy the said rents, and arrearages thereof, in such manner and form, and as fully and amply, as the same are or were enjoyed at any time within the said space of sixty years. Provision for securing to the Crown such fee farm or other rents, etc., as have been paid within a limited time. [p. 150.]

8. Provided always that nothing in this Act contained shall extend or be prejudicial to the right, title or claim of any person or persons in or to any manors, lands, tenements or hereditaments, by virtue of or under any grant or grants, letters patent or letters patents from any of his Majesty's progenitors, ancestors or predecessors, or by virtue of or under any grant or grants, letters patent or letters patents, from his Majesty, made or passed before the first day of January, one thousand seven hundred and sixty-nine; so as such right, title or claim be prosecuted with effect by bill, plaint, information or other suit or proceeding, in some of his Majesty's Courts of Record at Westminster, within the space of one year from the first day of January, one thousand seven hundred and sixty-nine. Right under any grant from the Crown of any manors, etc., made before 1st January, 1769, not prejudiced by this Act, if prosecuted within a year.

9. Provided always that nothing in this Act contained shall extend or be prejudicial to any right, title or claim, which his Majesty now hath, to any lands, tenements or hereditaments, within the manor of East Greenwich, in the county of Kent; or to any messuages, lands, tenements or hereditaments, within the precinct, district or liberty commonly called the Savoy, in the county of Middlesex; or to any the Right of the Crown to any lands, etc., within the manor of East Greenwich, or district of the Savoy not prejudiced,

manors, messuages, advowsons, buildings, lands, tenements, hereditaments and appurtenances, being the estate and possession of the late hospital of the Savoy, or of the master and chaplains of the said hospital: so as such right, title or claim, be prosecuted with effect by bill, plaint, information, or other suit or proceeding, in some of his Majesty's Courts of Record at Westminster, within the space of two years from the first day of January, one thousand seven hundred and sixty-nine.

if prosecuted within two years.

Provision declaring what shall or shall not be deemed a putting in [p. 151.] charge, standing *insuper*, or taking or answering by or to the Crown, etc.

10. Provided always that no putting in charge, nor standing insuper, nor taking or answering the farm rents, revenues or profits of any of the said manors, lands, tenements or hereditaments, by force, colour or pretext of any letters patent or grants of concealments, or defective titles, or of manors, lands, tenements or hereditaments out of charge, or by force, colour or pretext of any inquisitions, presentments by or by reason of any commission or other authority to find out concealments, defective titles, or lands, tenements or hereditaments out of charge, shall be deemed, construed or taken to be a putting in charge, standing insuper, or taking or answering the farm rents, revenues or profits by or to his Majesty, or any of his progenitors or predecessors, heirs or successors; unless thereupon such manors, lands, tenements or hereditaments, have been or shall be, upon some information or suit, on the behalf of his Majesty, or some of his progenitors or predecessors, heirs or successors, upon a lawful verdict given or to be given, or demurrer in law, adjudged, or upon a hearing ordered or decreed for his Majesty, or of some of his progenitors or predecessors, heirs or successors, or some of them, within the space of sixty years next before the filing, issuing or commencing of every such action, bill, plaint, information, commission or other suit or proceeding as shall at any time or times hereafter be filed, issued or commenced for recovering the same, or in respect thereof as aforesaid.

THE CROWN CLAIMS LIMITATION (IRELAND) ACT, 1808

(48 Geo. 3, c. 47).

The Irish Nullum Tempus Act.

An Act for quieting Possessions and confirming defective Titles in Ireland, and limiting the Right of the Crown to sue in manner therein mentioned; and for the Relief of Incumbents in respect of Arrears due to the Crown, during the Incumbency of their Predecessors.

[27*th May*, 1808.]

9 Geo. 3, c. 16. Preamble recites 9 Geo 3, c. 16: And whereas it is expedient to limit in like manner the right and title of his Majesty, his heirs and successors, in and to all manors, lands, tenements, rents, tithes and hereditaments (except liberties and franchises) in Ireland to sixty years next before the commencement of any suit or proceeding for the same, and to secure to all his Majesty's subjects the free and quiet

enjoyment of all manors, lands, tenements, rents, tithes and hereditaments which they or those under whom they claim respectively have held or enjoyed, or whereof they have taken the rents, revenues, issues or profits, for the space of sixty years next before the commencement of any suit or proceeding for the same.

The Crown shall not sue (in Ireland) [p. 145.] for any estate when the right has not first accrued within sixty years before the commencement of such suit, unless the Crown has been in possession, etc., or the rents have been in charge to the Crown within the sixty years.

1. The King's Majesty, his heirs or successors, shall not at any time hereafter sue, impeach, question or implead any person or persons, bodies politic or corporate in Ireland, for or in anywise concerning any manors, lands, tenements, rents, tithes or hereditaments whatsoever (other than liberties or franchises), or for or in anywise concerning the revenues, issues or profits thereof, or make any title, claim, challenge, or demand of, in, or to the same or any of them, by reason of any right or title which hath not first accrued or grown, or which shall not hereafter first accrue or grow, within the space of sixty years next before the filing, issuing or commencing of every such action, bill, plaint, information, commission or other suit or proceeding, as shall at any time or times hereafter be filed, issued or commenced for recovering the same or in respect thereof, unless his Majesty, or some of his progenitors, predecessors, heirs or successors, or some other person or persons, bodies politic or corporate, under whom his Majesty, his heirs or successors, any thing hath or lawfully claimeth, or shall have or lawfully claim, have or shall have been in the actual seisin thereof, or have or shall have been answered by force and virtue of any right or title to the same the rents, revenues, issues or profits thereof, *or the rents, issues or profits of any honors, manors, or other hereditaments, whereof the premises in question shall be part or parcel,* (*a*) within the said space of sixty years, *or that the same have or shall have been duly in charge to his Majesty, or some of his progenitors, predecessors or ancestors, heirs or successors, within the said space of sixty years* (*a*).

The subject secured after possession of sixty years. [p. 147.]

And all and every person or persons, bodies politic and corporate, their heirs and assigns, and all claiming by, from, or under them or any of them, for and according to their and every of their several estates and interests which they have or claim to have, or shall or may have or claim to have in the same respectively, shall at all times hereafter quietly and freely have, hold and enjoy, against his Majesty, his heirs and successors, claiming by any title which hath not first accrued or grown, or which shall not hereafter first accrue or grow, within the said space of sixty years, all and singular manors, lands, tenements, rents, tithes and hereditaments whatsoever (except liberties and franchises) which he or they, or his or their or any of their ancestors or predecessors, or those from, by or under whom they do or shall claim, [or] shall have held or enjoyed or taken the rents, revenues, issues or profits thereof by the space of sixty years next before the filing, issuing or commencing of every such action, bill,

(*a*) Repealed in effect by the Nullum Tempus (Ireland) Act, 1876 (*infra*, p. 458).

plaint, information, commission or other suit or proceeding, as shall at any time or times hereafter be filed, issued or commenced for recovering the same, or in respect thereof, unless his Majesty, or some of his progenitors, predecessors or ancestors, heirs or successors, or some other person or persons, bodies politic or corporate, by, from, or under whom his Majesty, his heirs or successors, any thing hath or lawfully claimeth, or shall have or lawfully claim in the said manors, lands, tenements, rents, tithes or hereditaments, by force of any right or title have or shall have been in the actual seisin thereof, or have been or shall have been answered by virtue of any such right or title, the rents, revenues, issues or other profits thereof, within the said space of sixty years, *or that the same have or shall have been duly in charge as aforesaid within the said space of sixty years* (*a*).

In what cases the rents shall be deemed in charge. [p. 144.]

2. Provided always that where the rents, revenues, issues or profits of any manors, lands, tenements, tithes or hereditaments are or shall be in charge, by, to, or with any auditor or auditors, or proper officer or officers of the revenue, such rents, revenues, issues and profits shall be held, deemed and taken to be duly in charge within the intent and meaning of this Act; any usage or custom to the contrary notwithstanding.

Cases in which reversions or remainders in the Crown of any lands, etc., are not liable to be impeached by this Act. [p. 148.]

3. Provided always that this Act or any thing herein contained shall not extend to bar, impeach or hinder his Majesty, his heirs or successors, of, for, or from any manors, tenements, rents, tithes or hereditaments, whereof any reversion or remainder now is in his Majesty, for or concerning the said reversion or remainder; nor of, for, or from any reversion or remainder, or possibility of reversion or remainder, in any of his Majesty's progenitors, predecessors or ancestors, which by the expiration, end, or other determination of any limited estate of fee simple, or of any fee tail or other particular estate, hath or ought to have first fallen or become in possession, or which shall or may or ought hereafter first to fall or come in possession, within the space of sixty years next before the filing, issuing or commencing of any such action, bill, plaint, information, commission or other suit or proceeding, as shall at any time or times hereafter be filed, issued or commenced for recovering the same, or in respect thereof; nor of, for, or from any right or title first accrued or grown to his Majesty, or any of his progenitors, predecessors or ancestors, or which shall first accrue or grow to his Majesty, or any of his heirs or successors, of, in, or to any manors, lands, tenements, rents, tithes or hereditaments, at any time or times within the space of sixty years next before the filing, issuing or commencing of any such action, bill, plaint, information, commission, or other suit or proceeding, as shall at any time or times hereafter be filed, issued or commenced for recovering the same or in respect thereof, and not before.

(*a*) Repealed in effect by the Nullum Tempus (Ireland) Act, 1876 (*infra*, p. 458).

4. Provided also that all and singular the said manors, lands, tenements, tithes and hereditaments, shall at all times hereafter be holden of his Majesty, his heirs and successors, and of other person or persons, bodies politic and corporate, their heirs and successors respectively, by the same tenures, services, fee farms, chief rents, quit rents, heriots, and other duties, to all intents and purposes, as the same should or ought of right to have been holden if the estates, rights and interests established and made sure by this present Act had been before the making of this Act firm and effectual in law: saving to every person and persons, bodies politic and corporate, their heirs and successors (other than his most excellent Majesty, his heirs and successors) all such rights, title, interest, estate, rents, commons, customs, duties, profits, and other claims and demands whatsoever, into or out of the said manors, lands, tenements, tithes or hereditaments, as they or any of them had or ought to have had before the passing of this Act; any thing in this Act to the contrary notwithstanding.

Lands to be holden of the Crown upon the usual tenures, services, and duties. [p. 151.]

5. Provided also that where any fee farm rent, or other rent or rents have been or shall be answered and actually paid to the King's Majesty, or to any of his predecessors, heirs or successors, within the space of sixty years next before any action, bill, plaint, information, commission, or other suit or proceeding shall at any time or times hereafter be filed, issued or commenced for recovering the same, or in respect thereof, out of any manors, lands, tenements, tithes, or hereditaments, of which manors, lands, tenements, tithes, or hereditaments, the estates, rights or interests, being defective, are established and made sure by this present Act, [that] his Majesty, his heirs and successors, shall from henceforth for ever have, held, and enjoy the said rents and arrearages thereof in such manner and form and as fully and as amply as the same are or were enjoyed at any time within the said space of sixty years.

Where rents shall be paid to the Crown within sixty years, they shall remain payable. [p. 151.]

6. In all cases where any rents or other dues in the nature or lieu of rents now are or shall hereafter become due and payable to his Majesty, his heirs and successors, out of or chargeable upon any rectories, vicarages, curacies or other ecclesiastical benefices, or payable by the rectors, vicars, curates, or other ecclesiastical persons, the incumbents thereof respectively having respectively actual cure of souls, such rectors, vicars, curates, or other ecclesiastical persons, or any of them, shall not be subject or liable to or compellable to pay or satisfy to his Majesty, his heirs or successors, any arrear or arrears of such rent or rents, or other dues which shall have accrued or shall hereafter accrue due and payable before the accruing of the title of such rector, vicar, curate or other ecclesiastical person to such rectories, vicarages, curacies or other ecclesiastical benefices aforesaid; and no distress, action, suit or other proceeding whatsoever shall be made, brought, commenced or prosecuted against any such rector, vicar, curate, or other ecclesiastical person during his life, or against his lands,

Incumbents of benefices shall not be liable for arrears of Crown rents accrued before their incumbency.

tenements, goods or chattels after his death, for any such arrear, or any part thereof.

THE STATUTE OF FRAUDS AMENDMENT ACT, 1828

(9 Geo. 4, c. 14).

An Act for rendering a written memorandum necessary to the validity of certain promises and engagements.

[*9th May*, 1828.]

Lord Tenterden's Act.

Preamble *recites English Act* (21 *Jac.* 1, *c.* 16), *and Irish Act* (10 *Car.* 1, *sess.* 2, *c.* 6): and whereas various questions have arisen in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said enactments; and it is expedient to prevent such questions, and to make provision for giving effect to the said enactments and to the intention thereof.

In actions of debt or upon the case grounded upon simple contract, no acknowledgment or [p. 325.] promise shall be deemed sufficient evidence of a contract, unless it be in writing [p. 353.] signed by the party chargeable. [p. 379.]

1. (*a*) In actions of debt or upon the case grounded upon any simple contract no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the said enactments or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: Provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever: Provided also, that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited Acts or this Act, as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.

Acknowledgment by joint contractor not to bind the others. [p. 353.]

Effect of part payment not to be altered.

Plaintiff may recover against one joint contractor though he may fail against the others.

Sect. 2. (*Pleas in Abatement*), *repealed*, 53 & 54 *Vict. c.* 33 (*S. L. R.*).

Pleas in abatement.

(*a*) Sects. 1 to 4 are repealed so far as they relate to personal actions or actions of ejectment in the superior courts of law in Ireland: Ir. C. L. P. A., 1853 (16 & 17 Vict. c. 113), s. 3.

3. No indorsement or memorandum of any payment written or made after the time appointed for this Act to take effect upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes.

Indorsements of payment by payee not to save statute. [p. 379.]

4. The said recited Acts and this Act shall be deemed and taken to apply to the case of any debt on simple contract alleged by way of set-off on the part of any defendant, either by plea, notice or otherwise.

Statute to apply to simple contract debts alleged by way of set-off. [p. 246.]

8. No memorandum or other writing made necessary by this Act shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps.

Memorandum exempted from stamp duties. [p. 345.]

9. Nothing in this Act contained shall extend to *Scotland*.

Not to extend to Scotland.

THE REAL PROPERTY LIMITATION ACT, 1833

(3 & 4 Will. 4, c. 27).

An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto.

[The sections in italics have been repealed and replaced by the R. P. L. A., 1874.]

[*24th July*, 1833.]

1. The words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say,) the word "land" shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word "rent" shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); and the person through whom another person is said to claim shall mean any person by, through, or under, or by the act of whom, the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming,

Meaning of the words in the Act.

"Land." [p. 17.]

"Rent." [p. 21.]

Person through whom another claims. [p. 9.]

"Person." [p. 8.] Number and gender.

or some person through whom he claims, became entitled as lord by escheat; and the word "person" shall extend to a body politic, corporate, or collegiate, and to a class of creditors or other persons, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

See R. P. L.A., 1874, s. 1. [p. 8.]

2. *After the thirty-first day of December one thousand eight hundred and thirty-three no person shall make an entry or distress or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same.*

When the right shall be deemed to have accrued: in the case of [p. 29.] an estate in possession;

3. In the construction of this Act the right to make an entry or distress or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; and when

in the case of [p. 49.] the estate of a deceased person;

the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when

in the case of an estate [p. 49.] passing under some instrument other than a will;

the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument; and when

in case of a future estate; [p. 52.]

the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate

or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken. [p. 57.] in case of a forfeiture or breach of condition.

4. Provided always, that when any right to make an entry or distress or to bring an action to recover any land or rent, by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened. Where reversioner [p. 57.] does not take advantage of a forfeiture, he shall have a new right when his estate comes into possession.

5. *Provided also, that a right to make an entry or distress or to bring an action to recover any land or rent shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent.* See R. P. L. A., 1874, s. 2. [p. 54.]

6. For the purposes of this Act an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration. Administrator shall claim as if he obtained [p. 51.] the estate without interval after death of deceased.

7. When any person shall be in possession or in receipt of the profits of any land or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued, either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: Provided always, that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee. In case of [p. 97.] tenant at will, the right shall be deemed to have accrued at the determination of the tenancy, or at the end [p. 76.] of one year from its commencement.

8. When any person shall be in possession or in receipt of the

In case of tenancy from year to year, etc., the right, shall be deemed to have accrued at the end of the first year, etc., or at the last payment of rent.
[p. 108.]

profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen).

Where rent amounting to 20s., reserved by a lease in writing, has been wrongfully received, the right shall be deemed to have accrued at the time of such wrongful receipt, and not on the determination of the lease.
[p. 111.]

9. When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims, to make an entry or distress or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.

A mere entry not to be deemed possession.
[p. 11.]

10. No person shall be deemed to have been in possession of any land within the meaning of this Act merely by reason of having made an entry thereon.

No right to be preserved by continual claim.
[p. 11.]

11. No continual or other claim upon or near any land shall preserve any right of making an entry or distress or of bringing an action.

Possession of one coparcener, etc., not to be the possession of the others.
[p. 32.]

12. When any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares, of such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them.

Possession of a younger brother, etc., not to be the possession of the heir.
[p. 7.]

13. When a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir.

Acknowledgment of title

14. Provided always, that when any acknowledgment of the title of the person entitled to any land or rent shall have been given

to him or his agent in writing signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given.

in writing given to the [p. 322.] person entitled, or his agent, shall be equivalent to possession or receipt of rent, and time shall run from the date thereof.

15. Provided also, that when no such acknowledgment as aforesaid shall have been given before the passing of this Act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this Act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or interest (*a*) at any time within five years next after the passing of this Act.

Where possession is not adverse at the time of [p. 7.] passing this Act, the right shall not be barred until the end of five years afterwards.

16. *Provided always, that if at the time at which the right of any person to make an entry or distress or bring an action to recover any land or rent shall have first accrued as aforesaid such person shall have been under any of the disabilities hereinafter mentioned, (that is to say,) infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or rent at any time within ten years next after the time at which the person to whom such right shall first have accrued as aforesaid shall have ceased to be under any such disability, or shall have died (which shall have first happened).*

See R. P. L. A., 1874, s. 3. [p. 288.]

17. *Provided nevertheless, that no entry, distress or action shall be made or brought by any person who, at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.*

See R. P. L. A., 1874, s. 5. [p. 289.]

18. Provided always, that when any person shall be under any of

No further time to be

(*a*) A misprint for "rent."

allowed for a succession of disabilities.

[p. 288.]

the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress or to bring an action to recover such land or rent beyond the said period of twenty (*a*) years next after the right of such person to make an entry or distress or to bring an action to recover such land or rent shall have first accrued, or the said period of ten (*a*) years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person.

Scotland, Ireland, etc., not to be deemed beyond seas.

19. No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent to any of them (being part of the dominions of his Majesty), shall be deemed to be beyond seas within the meaning of this Act (*b*).

When the right of any person to an estate in possession is barred, his right to future estates shall also be barred.

[p. 59.]

20. When the right of any person to make an entry or distress or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest, or right, which shall have been limited or taken effect after or in defeasance of such estate or interest in possession.

Where right of tenant in tail is barred, remaindermen whom he might have barred shall not recover.

[p. 62.]

21. When the right of a tenant in tail of any land or rent to make an entry or distress or to bring an action to recover the same shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress or action shall be made or brought by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred.

Possession adverse to a tenant in tail shall run on against the remaindermen whom he might have barred.

[p. 62.]

22. When a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore limited, which shall be applicable in such case, for making an entry or distress or bringing an action to recover such land or rent, no person claiming any estate, interest, or right, which such tenant in tail might lawfully have barred, shall make an entry or distress or bring an action to recover such land or rent but within the period

(*a*) These periods are altered to twelve and six years by sect. 9 of the R. P. L. A., 1874.

(*b*) This section is made obsolete by sect. 4 of the R. P. L. A., 1874.

during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action.

See R. P. L. A., 1874, s. 6. [p. 63.]

23. *When a tenant in tail of any land or rent shall have made an assurance thereof, which shall not operate to bar an estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail), shall continue or be in such possession or receipt for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then, at the expiration of such period of twenty years, such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail.*

No suit in equity to be brought after the time when the plaintiff, if entitled at law, might have brought an action. [p. 68.]

24. No person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity.

In cases of express trust, the right shall not be deemed to have accrued until a conveyance to a purchaser, and then only against him. [p. 68.]

25. Provided always, that when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him.

In cases of fraud no time shall run while the fraud remains concealed. [p. 302.]

26. In every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent, of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence might have been first known or discovered: Provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any *bonâ fide* purchaser for valuable consideration who has not assisted in the commission of such fraud, and who at the time that

Saving as to purchasers for valuable consideration without notice.

he made the purchase did not know and had no reason to believe that any such fraud had been committed.

Saving as to refusing relief [p. 254.] in equity on the ground of acquiescence or otherwise.

27. Provided always, that nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief on the ground of acquiescence or otherwise to any person whose right to bring a suit may not be barred by virtue of this Act.

See R. P. L. A., 1874, s. 7. [p. 89.]

28. *When a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent, comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor or of his right* [p. 323.] *of redemption shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given; and when there shall be more than one mort-* [p. 337.] *gagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the* [p. 337.] *mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or* [p. 338.] *land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.*

No lands or rents to be recovered by [p. 12.]

29. Provided always, that it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, to make an entry or distress or to bring an action or suit to recover any land or rent within such

period as hereinafter is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress or bring such action or suit shall first have accrued; (that is to say,) the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will, with the time of the holding of such two persons and such six years, make up the full period of sixty years; and no such entry, distress, action, or suit shall be made or brought at any time beyond the determination of such period.

ecclesiastical or eleemosynary corporations sole but within two incumbencies and six years after, or sixty years.

30. No person shall bring any quare impedit or other action or any suit to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as hereinafter is mentioned; (that is to say,) the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as with the times of such incumbencies will make up the full period of sixty years.

No advowson to be recovered but within three incumbencies or sixty years. [p. 14.]

31. Provided always, that when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by his Majesty or the ordinary by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but when a clerk shall have been presented by his Majesty upon the avoidance of a benefice in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this Act, be deemed a continuation of the incumbency of the clerk so made bishop.

Incumbencies after lapse to be reckoned in the period, but not incumbencies after promotions to bishopries. [p. 14.]

32. In the construction of this Act every person claiming a right to present to or bestow any ecclesiastical benefice, as patron thereof, by virtue of any estate, interest, or right which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any quare impedit, action or suit, shall be limited accordingly.

Persons claiming an advowson in remainder, etc., after an estate tail shall be [p. 14.]

deemed persons claiming through tenant in tail. [p. 14.]

33. Provided always, that no person shall bring any quare impedit or other action or any suit to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share, or right held or derived under the same title.

No advowson to be recovered after one hundred years.

At the end of any period of limitation the right of the party out of possession shall be extinguished. [p. 116.]

34. At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action or suit respectively might have been made or brought within such period, shall be extinguished.

Receipt of rent to be deemed receipt of profits. [p. 96.]

35. The receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this Act.

Real and mixed actions abolished after the 31st December, 1834;

36. No writ of right patent, writ of right quia dominus remisit curiam, writ of right in capite, writ of right in London, writ of right close, writ of right de rationabili parte, writ of right of advowson, writ of right upon disclaimer, writ de rationabilibus divisis, writ of right of ward, writ de consuetudinibus et servitiis, writ of cessavit, writ of escheat, writ of quo jure, writ of secta ad molendinum, writ de essendo quietum de theolonio, writ of ne injuste vexes, writ of mesne, writ of quod permittat, writ of formedon in descender, in remainder, or in reverter, writ of assize of novel disseisin, nuisance, darrein-presentment, juris utrum, or mort d'ancestor, writ of entry sur disseisin, in the quibus, in the per, in the per and cui, or in the post, writ of entry sur intrusion, writ of entry sur alienation dum fuit non compos mentis, dum fuit infra ætatem, dum fuit in prisona, ad communem legem, in casu proviso, in consimili casu, cui in vita, sur cui in vita, cui ante divortium, or sur cui ante divortium, writ of entry sur abatement, writ of entry quare ejecit infra terminum, or ad terminum qui præteriit, or causa matrimonii prælocuti, writ of aiel, besaiel, tresaiel, cosinage, or nuper obiit, writ of waste, writ of partition, writ of disceit, writ of quod ei deforceat, writ of covenant real, writ of warrantia chartæ, writ of curia claudenda, or writ per quæ servitia, and no other action, real or mixed (except a writ of right of dower, or writ of dower unde nihil habet, or a quare impedit, or an ejectment), and no plaint in the nature of any such writ or action (except a plaint for freebench or dower),

shall be brought after the thirty-first day of December one thousand eight hundred and thirty-four (*a*). except for dower, quare impedit, and ejectment.

37. Provided always, that when, on the said thirty-first day of December one thousand eight hundred and thirty-four, any person who shall not have a right of entry to any land shall be entitled to maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought at any time before the first day of June one thousand eight hundred and thirty-five in case the same might have been brought if this Act had not been made, notwithstanding the period of twenty years hereinbefore limited shall have expired (*a*). Real actions may be brought until the 1st June, 1835.

38. Provided also, that when, on the said first day of June one thousand eight hundred and thirty-five, any person whose right of entry to any land shall have been taken away by any descent cast, discontinuance, or warranty, might maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought after the said first day of June one thousand eight hundred and thirty-five, but only within the period during which by virtue of the provisions of this Act an entry might have been made upon the same land by the person bringing such writ or action if his right of entry had not been so taken away (*a*). Saving the rights of persons entitled to real actions only at the commencement of the Act, etc.

39. No descent cast, discontinuance, or warranty which may happen or be made shall toll or defeat any right of entry or action for the recovery of land. No descent, warranty, etc., to bar a right of entry.

40. *After the said thirty-first day of December one thousand eight hundred and thirty-three no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was given.* See R. P. L. A., 1874, s. 8. [p. 154.] [pp. 323, 355.]

41. No arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit. No arrears of dower to be [p 174.] recovered for more than six years.

42. No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any [p. 174.] No arrears of

(*a*) Repealed, Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59). The exceptions in favour of actions for dower had previously been repealed by the Statute Law Revision Act, 1874 (37 & 38 Vict. c. 35), which also repealed sections 37 & 38.

rent or interest in respect of money [p. 324.] charged upon land and legacies, etc., to be recovered for [p. 179.] more than six years. Proviso where a prior mortgagee has been in possession.

legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: Provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years.

Act to extend to spiritual [p. 168.] courts.

43. No person claiming any tithes, legacy or other property, for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any spiritual Court to recover the same but within the period during which he might bring such action or suit at law or in equity.

Act not to extend to Scotland. [p. 14.]

44. This Act shall not extend to Scotland; [and shall not, so far as it relates to any right to present to or bestow any church, vicarage or other ecclesiastical benefice, extend to Ireland (*a*).]

THE CIVIL PROCEDURE ACT, 1833

(3 & 4 Will. 4, c. 42, ss. 2–7).

An Act for the further Amendment of the Law and the better Advancement of Justice.

[14*th August*, 1833.]

Executors, etc., may bring actions [pp. 226, 227.] for injuries to the real estate of the deceased; and actions may be brought against executors, etc., for an injury to property.

2. An action of trespass or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person; and further, an action of trespass or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect of his

(*a*) As regards these rights the Act was extended to Ireland by 6 & 7 Vict. c. 54; but these words were repealed by 37 & 38 Vict. c. 35 (Stat. Law Rev. Act, 1874).

property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person. real or personal, by their testator.

3. All actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *fieri facias*, and all actions for penalties, damages, or sums of money given to the party grieved by any statute now or hereafter to be in force, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognizance, within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, within two years after the cause of such actions or suits, but not after; and the said other actions within six years after the cause of such actions or suits, but not after: Provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited. Limitation of actions of debt for rent and on specialties, etc. [p. 194.] [p. 241.]

4. If any person or persons that is or are or shall be entitled to any such action or suit, or to such *scire facias*, is or are or shall be, at the time of any such cause of action accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times after their coming to or being of full age, discovert, of sound memory, or returned from beyond the seas, as other persons having no such impediment should, according to the provisions of this Act, have done; and if any person or persons against whom there shall be any such cause of action is or are, or shall be at the time such cause of action accrued, beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such times as are before limited after the return of such person or persons from beyond the seas. Proviso for actions by infants, femes covert, etc., [p. 291.] and for absence of [p. 294.] defendants beyond seas.

5. Provided always, that if any acknowledgment shall have been made either by writing signed by the party liable by virtue of such indenture, specialty, or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons Proviso in case of acknowledgment in [pp. 324, 355.] writing or by part payment.

entitled to such actions to bring his or their action for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid, or in case the person or persons entitled to such action shall at the time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making the same, beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond the seas, as the case may be ; and the plaintiff or plaintiffs in any such action on any indenture, specialty, or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute.

Limitation of new actions [p. 199.] after judgment reversed, etc.

6. And nevertheless be it enacted, if in any of the said actions judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and, upon matter alleged in arrest of judgment, the judgment be given against the plaintiff that he take nothing by his plaint, writ, or bill, . . . that in all such cases the party plaintiff, his executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff, and not after.

No part of the United Kingdom, [p. 294.] etc., to be deemed beyond the seas within the meaning of this Act.

7. No part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney and Sark, nor any islands adjacent to any of them, being part of the dominions of his Majesty, shall be deemed to be beyond the seas within the meaning of this Act, or of the Act passed in the twenty-first year of the reign of King James the First, intituled, "An Act for Limitation of Actions and for avoiding Suits in Law."

THE REAL PROPERTY LIMITATION ACT, 1837

(7 Will. 4 and 1 Vict. c. 28).

An Act to amend an Act of the Third and Fourth Years of his late Majesty, for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto.

[*3rd July*, 1837.]

Whereas doubts have been entertained as to the effect of a certain Act of Parliament made in the third and fourth years of his late Majesty King William the Fourth, intituled "An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto," so far as the same

3 & 4 Will. 4, c. 27.

relates to mortgages; and it is expedient that such doubts should be removed:

It shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said Act, to make an entry or bring an action at law or suit in equity to recover such land at any time within *twenty* (*a*) years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than *twenty* (*a*) years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in the said Act notwithstanding.

Mortgagees of land, being land within [p. 85.] the definition in 3 & 4 Will. 4, c. 27, s. 1, [p. 354.] may bring actions to recover land within *twenty* (*a*) years after last payment of principal or interest.

IRISH COMMON LAW PROCEDURE AMENDMENT ACT, 1853

(16 & 17 Vict. c. 113, ss. 20–27).

An Act to amend the Procedure in the Superior Courts of Common Law in Ireland.

With respect to the period of limitation within which personal actions shall be brought;—

20. All actions for rent upon an indenture of demise, all actions upon any bond or other specialty, or upon any judgment, statute staple, statute merchant, or recognizance, shall be commenced and sued within twenty years after the cause of such actions or suits, or the recovery of such judgment, but not after; all actions grounded upon any lending or contract, express or implied, without specialty, or upon any award, where the submission is not by specialty, or for any money levied on *fieri facias;* all actions of account or for not accounting, other than for such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants; all actions for direct injuries to real or personal property; actions for the taking away, detention or conversion of property, goods and chattels; actions for libel, malicious prosecution and arrest, seduction, criminal conversation; and actions for all other causes which would heretofore have been brought in the form of action called trespass on the case, except as hereinafter excepted, shall be commenced and sued within six years after the cause of such actions, but not after; and all actions for assault, menace, battery, wounding and imprisonment shall be commenced and sued within four years after the cause of such actions, but not after; and all actions for words, and for penalties, damages, or sums of money given to the party grieved, by any statute now or hereafter to be in force, shall be commenced and sued within two years after the words spoken, or the cause of such action or suit, but not

Limitation of time for commencement of certain actions. [pp. 197, 198.]

(*a*) "Twenty" altered to "twelve" (R. P. L. A., 1874, s. 9).

after : and with respect to every cause of action not herein specifically provided for, being the subject-matter of a personal action, such actions in respect thereof shall be brought within the same period of limitation now applicable thereto, notwithstanding that such cause of action may be described or expressed in such statutes by reference to any particular form of action : Provided that nothing in this Act contained shall alter the period of limitation of any action given by any statute where the time for bringing such action is, or shall be, by any statute specially limited.

Limitation of time for commencing new actions in certain cases. [p. 199.]

21. If in any of the said actions judgment be given for the plaintiff and the same be reversed by error, or a verdict pass, or upon judgment by default, damages be assessed for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff that he take nothing by his plaint, in all such cases the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to time within the period of limitation hereinbefore provided for in such action, or within a year after such judgment reversed, or judgment given against the plaintiff, and not after.

Limitation of time in case of persons under disability, etc. [p. 292.]

22. If any person that is or shall be entitled to any such action is or shall be at the time of any such cause of action accrued within the age of twenty-one years, a married woman, of unsound mind, or beyond the seas, then such person shall be at liberty to bring the same action, so as he commence the same within such time after the cessation of such disability or his return from beyond the seas, as other persons having no such impediment should, according to the provisions of this Act, have done; and if any person or persons against whom there shall be any such cause of action is or shall be at the time such cause of action accrued beyond the seas, then the person entitled to any such cause of action shall be at liberty to bring the same against such person, within such time as is before limited, after the return of such person from beyond the seas. [p. 294.]

Limitation of time after acknowledgment or part payment on account of any specialty debt, etc. [pp. 324, 355.]

23. If any acknowledgment shall have been or shall be made, either by writing signed by the party liable by virtue of any indenture, specialty, judgment, statute staple, or statute merchant, or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall be lawful for the person entitled to bring his action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment by writing, or part payment or part satisfaction as aforesaid, or, in case the person entitled shall at the time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgment be at the time of making the same beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond the seas, as the case may be; and the plaintiff in any such action on any indenture, specialty,

judgment, statute staple, or statute merchant, or recognizance, may rely on such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute.

After acknowledgment or part payment [pp. 325, 379.]

24. In actions grounded upon any simple contract no acknowledgment or promise shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the provisions of this Act in relation to the limitation of actions, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator shall lose the benefit of this Act so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: Provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whomsoever.

on account of any simple contract debt.

Memorandum of part payment by [p. 379.]

25. No indorsement or memorandum of any payment written or made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment so as to take the case out of the operation of the provisions of this Act in relation to the limitation of actions.

creditor not to take the case out of the provisions of this Act.

Set-off by defendant.

26. This Act shall be deemed and taken to apply to the case of any debt alleged by way of set-off on the part of any defendant.

Memorandum not to require stamp. [p. 345.]

27. No memorandum or other writing made necessary by this Act shall be deemed to be an agreement within the meaning of any statute relating to the duties on stamps.

THE MERCANTILE LAW AMENDMENT ACT, 1856

(19 & 20 Vict. c. 97, ss. 9–14).

An Act to amend the laws of England and Ireland affecting Trade and Commerce.

[29*th July*, 1856.]

Limitation of actions for merchants' accounts. [p. 215.]

9. All actions of account or for not accounting, and suits for such accounts, as concern the trade of merchandise between merchant and merchant, their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits; and no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action or suit.

Periods under statutes of limitation not to be extended by reason of persons being beyond seas or imprisoned.
[p. 292.]

10. No person or persons who shall be entitled to any action or suit, with respect to which the period of limitation within which the same shall be brought is fixed by the Limitation Act, 1623, sect. 3, or by the Act of the fourth year of the reign of Queen Anne, chap. 16 (*a*), sect. 17, or by the Act of the fifty-third year of the reign of King George the Third, chap. 127, sect. 5, or by the Acts of the third and fourth years of the reign of King William the Fourth, chap. 27, sects. 40, 41 and 42, and chap. 42, sect. 3, or by the Common Law Procedure Amendment Act (Ireland), 1853, sect. 20, shall be entitled to any time within which to commence and sue such action or suit beyond the period so fixed for the same by the enactments aforesaid, by reason only of such person, or some one or more of such persons, being at the time of such cause of action or suit accrued beyond the seas, or in the cases in which, by virtue of any of the aforesaid enactments, imprisonment is now a disability, by reason of such person, or some one or more of such persons, being imprisoned at the time of such cause of action or suit accrued.

Period of limitation as to joint debtors in the kingdom, where some are beyond seas.
[p. 295.]

11. Where such cause of action or suit with respect to which the period of limitation is fixed by the enactments aforesaid, or any of them, lies against two or more joint debtors, the person or persons who shall be entitled to the same shall not be entitled to any time within which to commence and sue any such action or suit against any one or more of such joint debtors who shall not be beyond the seas at the time such cause of action or suit accrued, by reason only that some other one or more of such joint debtors was or were at the time such cause of action accrued beyond the seas, and such person or persons so entitled as aforesaid shall not be barred from commencing and suing any action or suit against the joint debtor or joint debtors who was or were beyond the seas at the time the cause of action or suit accrued, after his or their return from beyond seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not or were not beyond seas at the time aforesaid.

Definition of "beyond seas."
[p. 294.]

12. No part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney and Sark, nor any islands adjacent to any of them, being part of the dominions of her Majesty, shall be deemed to be beyond seas within the meaning of the Act of the fourth and fifth years of the reign of Queen Anne, chap. 16 (*a*), or of this Act.

Acknowledgments by agent.
[p. 325.]

13. In reference to the provisions of the Acts of the ninth year of the reign of King George the Fourth, chap. 14, sects. 1 and 8, and the sixteenth and seventeenth years of the reign of her present Majesty, chap. 113, sects. 24 and 27, an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorized to make such acknowledgment or promise,

(*a*) 4 & 5 Anne, c. 3, in the Revised Statutes.

shall have the same effect as if such writing had been signed by such party himself.

14. In reference to the provisions of the Limitation Act, 1623, sect. 3, and of the Act of the third and fourth years of the reign of King William the Fourth, chap. 42, sect. 3, and of the Common Law Procedure Amendment Act (Ireland), 1853, sect. 20, when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such co-contractor, or co-debtor, executor, or administrator, shall lose the benefit of the said enactments, or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money, by any other or others of such co-contractors or co-debtors, executors, or administrators.

No co-contractor, etc., to lose the benefit of these statutes by payment by any other co-contractor, etc.

[pp. 373, 382.]

THE LAW OF PROPERTY AMENDMENT ACT, 1860

(23 & 24 Vict. c. 38, ss. 13 and 15).

An Act to further amend the law of property.

[23*rd July*, 1860.]

13. *Recital of* 3 & 4 *Will.* 4, *c.* 27, *s.* 40 : No suit or other proceeding shall be brought to recover the personal estate, or any share of the personal estate, of any person dying intestate, possessed by the legal personal representative of such intestate, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of such estate or share, or some interest in respect thereof, shall have been accounted for or paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person accountable for the same, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit shall be brought, but within twenty years after such accounting, payment or acknowledgment, or the last of such accountings, payments or acknowledgments, if more than one, was made or given.

Limitation of suits to recover personal estate of intestates.

[p. 169.]

[pp. 323, 355.]

15. This Act is not to extend to Scotland, nor are any of the clauses, except clause six and the subsequent clauses, to extend to Ireland.

Act not to extend to Scotland, etc.

THE CROWN SUITS ACT, 1861

(24 & 25 Vict. c. 62).

An Act to amend the Act of the Ninth Year of King George the Third, Chapter Sixteen, for quieting Possessions and Titles against the Crown, and also certain Acts for the like Object relating to Suits by the Duke of Cornwall.

[1*st August*, 1861.]

9 Geo. 3, c. 16.

Preamble recites 9 *Geo.* 3, *c.* 16 : And whereas the good purpose of that Act has not been fully obtained by reason of the provisions therein relating to lands and hereditaments which have been in charge to her Majesty or have stood insuper of record, and also by reason of certain provisions therein relating to lands and hereditaments part or parcel of honours, manors, or other hereditaments :—

The Crown not to sue after sixty years by reason of lands having been in charge, etc.

[p. 144.]

1. The Queen's Majesty, her heirs and successors, shall not at any time hereafter sue, impeach, question, or implead any person or persons for or in anywise concerning any manors, lands, tenements, rents, tithes or hereditaments whatsoever (other than liberties or franchises) which such person or persons, or his or their or any of their ancestors or predecessors, or those from, by, or under whom they do or shall claim, have, or shall have held or enjoyed or taken the rents, revenues, issues, or profits thereof by the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same or in respect thereof, by reason only that the same manors, lands, tenements, rents, tithes or hereditaments, or the rents, revenues, issues, or profits thereof, have or shall have been in charge to her Majesty or her predecessors or successors, or stood insuper of record, within the said space of sixty years ; but that such having been in charge and such standing insuper of record shall be as against such person and persons, and all claiming by, from, or under them or any of them, of no force and effect.

7 & 8 Vict. c. 105. 23 & 24 Vict. c. 53.

[p. 152.]

2. And whereas an Act was passed in the session held in the seventh and eighth years of her Majesty, chapter one hundred and five, "for quieting titles within the county of Cornwall as against the Duchy of Cornwall, and other purposes :" And whereas another Act was passed in the session held in the twenty-third and twenty-fourth years of her Majesty, chapter fifty-three, "for the limitation of actions and suits by the Duke of Cornwall in relation to real property, and for other purposes :" And whereas it is expedient that the limitation applicable to actions and suits by the Crown should be made applicable to actions and suits by the Duke of Cornwall :

The provisions of this Act hereinbefore contained applicable to the Queen's Majesty shall extend and be applicable to the Duke of Cornwall, and to the said two last-recited Acts, in the same manner as if the Duke of Cornwall were hereinbefore mentioned or referred to where the Queen's Majesty is mentioned or referred to; and this Act shall be construed together with and be deemed to form part of the said two last-recited Acts.

Provisions of this Act to apply to actions by the Duke of Cornwall.

3. The Queen's Majesty, her predecessors and successors, shall not be held, deemed or taken, for the purposes of the said Act of the ninth year of King George the Third, to have been answered the rents, revenues, issues, or profits of any lands, manors, tenements, rents, tithes, or hereditaments, which shall have been held or enjoyed, or of which the rents, revenues, issues, or profits, shall have been taken, by any other persons or person, by the space of sixty years next before the filing, issuing, or commencing of any such action, suit, bill, plaint, information, commission, or other suit or proceeding for recovering the same or in respect thereof, as in the said Act is mentioned, by reason only of the same lands, manors, tenements, rents, tithes, or hereditaments having been part or parcel of any honour or manor or other hereditaments of which the rents, revenues, issues, or profits, shall have been answered to her Majesty or her predecessors or successors, or some other person under whom her Majesty hath or lawfully claimeth or shall hereafter have or lawfully claim as aforesaid, or of any honour, manor, or other hereditaments which shall have been duly in charge to her Majesty, her predecessors or successors, or stood insuper of record as aforesaid.

Crown not to be deemed to [p. 144.] have been answered the rents by reason of lands having been part of a manor, etc., whereof the rents have been answered, etc.

4. In the construction of the said Act of the ninth year of King George the Third and of this Act the right or title of the Queen's Majesty, her heirs or successors, or of the Duke of Cornwall, to any manors, lands, tenements, rents, tithes, or hereditaments which are now or shall at any time hereafter be subject to or comprised in any demise or lease for any term or terms of years, or for any life or lives, granted by or on behalf of her Majesty, or any of her royal predecessors or successors, or the Duke of Cornwall, shall not be deemed to have first accrued or grown until the expiration or determination of such demise or lease as against any person or persons whose possession, holding, or enjoyment of such manors, lands, tenements, rents, tithes, or hereditaments, or whose receipt of the rents, issues, or profits thereof, shall have commenced during the term of such demise or lease, or who shall claim from, by, or under any person or persons whose possession, holding, or enjoyment of such manors, lands, tenements, rents, tithes, or hereditaments, or whose receipt of the rents, issues, or profits thereof, shall have so commenced as aforesaid.

When right of Crown or of Duke of Cornwall shall be deemed to [pp. 150, 153.] have accrued in respect of demised lands, etc.

5. *Act not to apply to existing suits*: repealed, 38 & 39 Vict. c. 66 (S. L. R.).

THE REAL PROPERTY LIMITATION ACT, 1874

(37 & 38 Vict. c. 57).

An Act for the further Limitation of Actions and Suits relating to Real Property.

[*7th August*, 1874.]

Whereas it is expedient further to limit the times within which actions or suits may be brought for the recovery of land or rent, and of charges thereon:

No land or rent to be recovered [p. 8.] but within twelve years after the right of action accrued.

1. After the commencement of this Act (*a*) no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same.

Provision for case of future [p. 54.] estates.

2. A right to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion or remainder, or other future estate or interest, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land or rent, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in the possession or receipt of the profits of such land, or in receipt of such rent: But if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action or suit shall be brought, by any person becoming entitled in possession to a future estate or interest, but within twelve years next after the time when the right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those two periods shall be the longer; and if the right of any such person to make such entry or

Time limited to six years [p. 55.] when person entitled to the particular estate out of possession, etc.

[p. 56.]

(*a*) The Act did not come into operation till 1st January, 1879; see s. 12.

distress, or to bring any such action or suit, shall have been barred under this Act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will, or settlement, executed or taking effect after the time when a right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the owner of the particular estate whose interest shall have so determined as aforesaid, shall make any such entry or distress, or bring any such action or suit, to recover such land or rent.

In cases of infancy, coverture, or [p. 288.] lunacy at the time when the right of action accrues, then six years to be allowed from the termination of the disability or previous death.

3. If at the time at which the right of any person to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, (that is to say,) infancy, coverture, idiotcy, lunacy, or unsoundness of mind, then such person, or the person claiming through him, may, notwithstanding the period of twelve years, or six years, (as the case may be,) hereinbefore limited shall have expired, make an entry or distress, or bring an action or suit, to recover such land or rent, at any time within six years next after the time at which the person to whom such right shall first have accrued shall have ceased to be under any such disability, or shall have died (whichever of those two events shall have first happened).

No time to be allowed for absence [p. 289.] beyond seas.

4. The time within which any such entry may be made, or any such action or suit may be brought as aforesaid, shall not in any case after the commencement of this Act be extended or enlarged by reason of the absence beyond seas during all or any part of that time of the person having the right to make such entry, or to bring such action or suit, or of any person through whom he claims.

Thirty years utmost allowance for disabilities. [p. 288.]

5. No entry, distress, action, or suit shall be made or brought by any person who at the time at which his right to make any entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within thirty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such thirty years, or although the term of six years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.

In case of possession under an assurance [p. 63.] by a tenant in tail, which shall not bar the remainders, they

6. When a tenant in tail of any land or rent shall have made an assurance thereof which shall not operate to bar the estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person or any other person whosoever (other than some person entitled to such possession or

shall be barred at the end of twelve years after that period, at which the assurance, if then executed, would have barred them.

receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail) shall continue or be in such possession or receipt for the period of twelve years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then, at the expiration of such period of twelve years, such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail.

Mortgagor to be barred at end of twelve [p. 89.] years from the time when the mortgagee took possession [p. 323.] or from the last written acknowledgment. [p. 337.]

7. When a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within twelve years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him; and in such case no such action or suit shall be brought but within twelve years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one [p. 337.] person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees [p. 338.] or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which

shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

Money charged upon land and [p. 154.] legacies to be deemed satisfied at the end of twelve years if no [pp. 323, 355.] interest paid nor acknowledgment given in writing in the meantime.

8. No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was given.

Act to be read with 3 & 4 Will. 4, c. 27, of which certain parts are repealed, and other parts to be read in reference to alteration by this Act.

9. From and after the commencement of this Act all the provisions of the Act passed in the session of the third and fourth years of the reign of his late Majesty King William the Fourth, chapter twenty-seven, except those contained in the several sections thereof next hereinafter mentioned, shall remain in full force, and shall be construed together with this Act, and shall take effect as if the provisions hereinbefore contained were substituted in such Act for the provisions contained in the sections thereof numbered two, five, sixteen, seventeen, twenty-three, twenty-eight, and forty respectively (which several sections, from and after the commencement of this Act, shall be repealed), and as if the term of six years had been mentioned, instead of the term of ten years, in the section of the said Act numbered eighteen, and the period of twelve years had been mentioned in the said section eighteen instead of the period of twenty years; and the provisions of the Act passed in the session of the seventh year of the reign of his late Majesty King William the Fourth, and the first year of the reign of her present Majesty, chapter twenty-eight, shall remain in full force, and be construed together with this Act, as if the period of twelve years had been therein mentioned instead of the period of twenty years.

7 Will. 4 & 1 Vict. c. 28, to be read with this Act.

Time for recovering [p. 162.] charges and arrears of interest not to be enlarged by express trusts for raising same.

10. After the commencement of this Act no action, suit or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust.

Short title. 11. This Act may be cited as the "Real Property Limitation Act, 1874."

Commencement of Act. 12. This Act shall commence and come into operation on the first day of January one thousand eight hundred and seventy-nine.

THE NULLUM TEMPUS (IRELAND) ACT, 1876

(39 & 40 Vict. c. 37).

An Act to assimilate the law in Ireland to the law in England as to quieting possessions and titles against the Crown.

[11*th August*, 1876.]

24 & 25 Vict. c. 62. Whereas by an Act passed in the twenty-fourth and twenty-fifth years of her Majesty, certain provisions were made for the better quieting possessions and titles against the Crown in England, and it is expedient to extend these provisions to Ireland in order that the Crown shall have no greater right over the estates of its subjects in Ireland than what it enjoys over the estates of its subjects in England:

The Crown not to sue for lands, etc., after sixty years by reason only of same having been in charge. [p. 145.] 1. The Queen's Majesty, her heirs and successors, shall not at any time hereafter sue, impeach, question, or implead any person or persons for or in anywise concerning any manors, lands, tenements, rents, tithes, or hereditaments whatsoever (other than liberties or franchises) which such person or persons, or his or their or any of their ancestors or predecessors, or those from, by, or under whom they do or shall claim, have, or shall have held or enjoyed or taken the rents, revenues, issues, or profits thereof, by the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same or in respect thereof, by reason only that the same manors, lands, tenements, rents, tithes, or hereditaments, or the rents, revenues, issues, or profits thereof, have or shall have been in charge to her Majesty or her predecessors or successors within the said sixty years, but that such having been in charge shall be, as against such person and persons, and all claiming by, from, and under them or any of them, of no force or effect.

The Crown not to sue after sixty years by reason only of the lands, etc., sued for being part of a manor, etc., of which [p. 145.] 2. The Queen's Majesty, her predecessors and successors, shall not be held, deemed, or taken for the purpose of any suit, bill, plaint, information, commission, or other proceeding to have been answered the rents, revenues, issues, or profits of any lands, manors, tenements, rents, tithes, or hereditaments which shall have been held or enjoyed, or of which the rents, revenues, issues, or profits shall have been taken, by any other person or persons by the space of sixty years next before the filing, issuing, or commencing of any such action, suit, bill, plaint, information, commission, or other proceeding for recovering

the same or in respect thereof, by reason only of the same lands, manors, tenements, rents, tithes or hereditaments having been part or parcel of any honour or manor or other hereditaments of which the rents, revenues, issues, or profits shall have been answered to her Majesty, her predecessors or successors, or some other person under whom her Majesty, her predecessors or successors, hath or lawfully claimeth or shall hereafter have or lawfully claim as aforesaid, or of any honour, manor, or other hereditaments, which shall have been duly in charge to her Majesty, her predecessors or successors as aforesaid.

the rents, etc., have been answered to Her Majesty, etc.

3. In the construction of the Crown Claims Limitation (Ireland) Act, 1808, and of this Act, the right or title of the Queen's Majesty, her heirs or successors, to any manors, lands, tenements, rents, tithes, or hereditaments which are now or shall at any time hereafter be subject to or comprised in any demise or lease for any term or terms of years, or for any life or lives, granted by or on behalf of her Majesty, or any of her royal predecessors or successors, shall not be deemed to have first accrued or grown until the expiration or determination of such demise or lease as against any person or persons whose possession, holding, or enjoyment of such manors, lands, tenements, rents, tithes, or hereditaments, or whose receipt of the rents, issues, or profits thereof, shall have commenced during the term of such demise or lease, or who shall claim from, by, or under any person or persons whose possession, holding, or enjoyment of such manors, lands, tenements, rent, tithes, or hereditaments, or whose receipt of the rents, issues, or profits thereof, shall have so commenced as aforesaid.

Preserving right to reversionary interests.

[p. 150.]

4. Nothing contained in this Act shall extend to any action, bill, plaint, information, commission, or other suit or proceeding instituted or commenced before the passing of this Act, and now pending (*a*).

Act not to apply to existing suits.

5. This Act may be cited as "The Nullum Tempus (Ireland) Act, 1876," and shall be read and construed with the Act for quieting possessions and confirming defective titles in Ireland passed in the forty-eighth year of his Majesty King George the Third.

This Act to be read as one Act with 48 Geo. 3. c. 47.

CROWN LANDS ACT, 1906

(6 Edw. 7, c. 28, s. 9).

An Act to Amend the Crown Lands Acts, 1829 to 1894.

[*4th August*, 1906.]

9. No proceeding shall be taken by or on behalf of the Crown for enforcing the payment of any quit rent or any other perpetual rent payable to the Crown in Ireland, or any arrears thereof, but within sixty years from the time when such rent was last received by or on behalf of the Crown, and after the expiration of that period the right of the Crown to the rent and arrears shall be extinguished.

Limitation of time for proceedings [p. 146.] for recovery by Crown of quit and other rents.

(*a*) Repealed, 46 & 47 Vict. c. 39 (Stat. Law Rev. Act, 1883).

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